TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER,

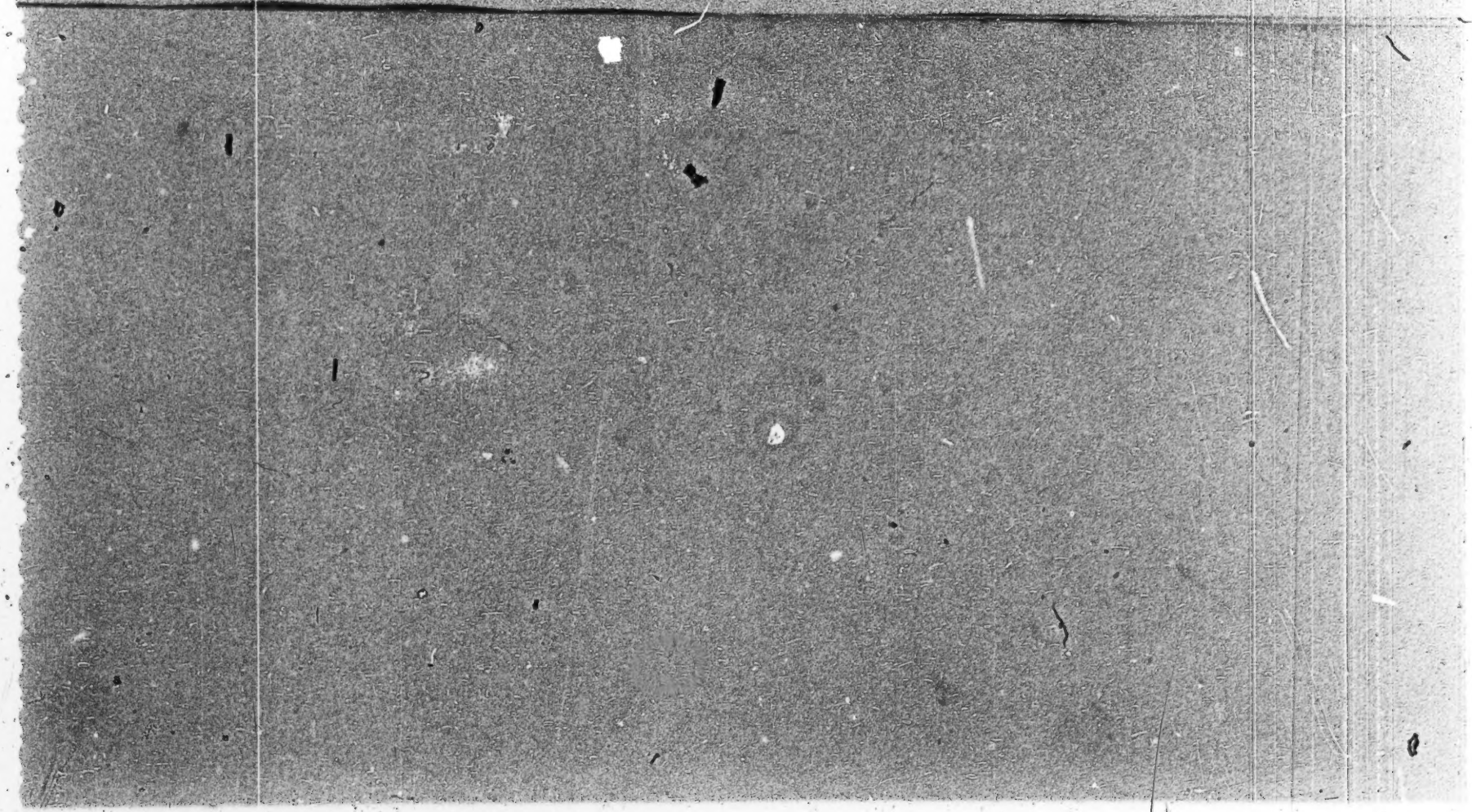
vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN AND POTTAWATTAMIE COUNTY, IOWA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 27, 1953.

CERTIORARI GRANTED OCTOBER 12, 1953.



CONSOLIDATED RECORD

In the
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
APPELLANT,
vs.
ARCHIE C. STUDE, WILLIAM LUMPKIN AND POTTAWATTAMIE COUNTY, IOWA,
APPELLEES.
(Notice of Appeal filed August 18, 1952.)
(Civil No. 1-81 in District Court.)
No. 14724

ARCHIE C. STUDE,
CROSS-APPELLANT,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
CROSS-APPELLEE.
(Two Notices of Appeal, one filed in No. 1-81 and one in No. 1-101, from portion of consolidated order of July 23, 1952, overruling Motion to Remand.)
No. 14725

ARCHIE C. STUDE AND WILLIAM LUMPKIN,
APPELLANTS,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,
APPELLEE.
No. 14726

(Notice of Appeal filed Oct. 14, 1952, in No. 1-101, from portion of consolidated order of July 23, 1952, overruling motion to remand and order in No. 1-101 of September 17, 1952, overruling the Motion for Rehearing.)

APPEAL AND CROSS-APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
WM. F. RILEY, JUDGE

INDEX

ADDITIONAL RECORD FOR CROSS-APPEAL AND APPEAL

Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit at the September Term, 1952, of said Court, before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable Seth Thomas and the Honorable John Caskie Collet, Circuit Judges.

Attest:

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the 22nd day of October, A. D. 1952, appeals from the United States District Court for the Southern District of Iowa were filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in certain causes wherein Chicago, Rock Island and Pacific Railroad Company was Appellant and Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, were Appellees, Archie C. Stude was Cross-Appellant and Chicago, Rock Island and Pacific Railroad Company was Cross-Appellee, and Archie C. Stude and William Lumpkin were Appellants and Chicago, Rock Island and Pacific Railroad Company was Appellee.

Printed consolidated record, filed November 3, 1952, on which the appeals were heard in said Court of Appeals, is in the words and figures following, to-wit:

On March 7, 1952, Chicago, Rock Island and Pacific Railroad Company filed in the office of the Clerk of the United States District Court for the Southern District of Iowa, Western Division, the following

COMPLAINT

Plaintiff, for cause of action against defendants, states and shows the court as follows:

1. Plaintiff is a corporation organized under the laws of the State of Delaware and is a resident and citizen of said State. Defendants, Archie C. Stude and William Lumpkin, are individual citizens of the State of Iowa, and Pottawattamie County, Iowa, is a governmental subdivision, which is made a party defendant to this action because it is the holder of a tax lien on the properties hereinafter more particularly described. Plaintiff has duly qualified as a foreign corporation in the State of Iowa, and has secured a license or permit from the Secretary of State of the State of Iowa to do business as a foreign corporation within the State of Iowa.

2. The matter involved in this action exceeds in value the sum of $3,000.00, exclusive of interest and costs, and the controversy is wholly between citizens of different states.

3. Plaintiff has been authorized by certificate of the Interstate Commerce Commission to construct a new line of railroad extending generally between a point approximately .91 mile west of Atlantic, Iowa, in Cass County, to a point on the existing line of Chicago, Great Western Railway Company located near McClelland, Pottawattamie County, Iowa, and has been authorized by the Interstate Commerce Commission to enter into a trackage arrangement with Chicago, Great Western Railway Company for the use of its tracks between McClelland and Council Bluffs, Iowa. Plaintiff has been authorized by the Iowa State Commerce Commission to institute condemnation proceedings and to acquire by condemnation the lands more particularly hereinafter described.

4. On or about the 18th day of January, 1952, this plaintiff, pursuant to the provision of the Iowa statutes,

instituted a proceeding in eminent domain before G. R. Steelle, Sheriff of Pottawattamie County, for the assessment and appraisal of damages sustained by the taking of the following described lands located in Pottawattamie County, Iowa, for railroad purposes, to-wit:

> That part of the North Half (N½) of Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West of the Fifth P. M. in Pottawattamie County, State of Iowa, described as a strip of land One Hundred Fifty (150) feet in width, being Seventy-five (75) feet on each side of the relocated main track centerline of Chicago, Rock Island and Pacific Railroad Company as now staked and located over and across the North Half (N½) of the Northeast Quarter of said Section Twenty (20), and Two Hundred Fifty (250) feet in width, being One Hundred Twenty-five (125) feet on each side of said relocated main track centerline over and across the North Half (N½) of the Northwest Quarter (NW¼) of said Section Twenty (20), which relocated main track centerline is more particularly described as beginning at a point in the East line of said Section Twenty (20), Seven Hundred Sixty-two and Five Tenths (762.5) feet South of the Northeast corner thereof and extending Northwesterly in a straight line to a point in the West Line of said Section Twenty (20), Five Hundred Thirty-one and Eight Tenths (531.8) feet South of the Northwest corner thereof and containing in all Twenty-four and Forty-seven Hundredths (24.47) acres, more or less.

Said lands were at said time owned by defendant, Archie C. Stude, a citizen of the State of Iowa, and a resident of Pottawattamie County, in said State. Pottawattamie County, Iowa, was made a party defendant in said proceeding merely because it was the holder of a tax lien on the property to be appropriated and condemned for railroad purposes, and is a mere nominal party to said proceeding.

5. G. R. Stuelke, Sheriff of Pottawattamie County, appointed Commissioners to view the premises and assess the damages to the real estate owned by Archie C. Stude by reason of the taking of the lands hereinbefore described for railroad purposes. Said Commissioners filed their report in writing with the Sheriff of Pottawattamie County, Iowa, on February 13, 1952, by which said Commissioners assessed the damages to the real estate of Archie C. Stude at $33,000.00, and damages to William Lumpkin, the tenant on said real estate, at $1,000.00, by reason of the condemnation of the lands hereinbefore described.

6. On the 7th day of March, 1952, Chicago, Rock Island and Pacific Railroad Company duly appealed from the award and the assessment of damages by serving a notice of appeal upon G. R. Stuelke, Sheriff of Pottawattamie County, Iowa, Archie C. Stude, William Lumpkin, and Pottawattamie County, Iowa, a true copy of which notice is hereto attached marked Exhibit "A", and by this reference made a part hereof.

7. Archie C. Stude is the record owner of the following described premises, to-wit:

> The Northwest Quarter (NW¼) of the Northwest Quarter (NW¼); the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); the Northwest (NW¼) of the Northeast Quarter (NE¼); and the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼), all in Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West, in Pottawattamie County, Iowa, containing in all approximately one hundred fifty-four acres, more or less.

The lands sought to be condemned lie in the center portion of the tract above described. The items of damage sustained by the lands of the defendant, Archie C. Stude, consist of the taking of 24.47 acres for railroad purposes and in severing the balance of the said tract. That the actual damages sustained by the lands of Archie C. Stude by reason of the appropriation of the 24.47 acres will not exceed $10,000.

8. The award of damages in the amount of $23,336.60 was and is grossly excessive, unreasonable, and far in excess of any actual damage which may be sustained to the lands and property of Archie C. Stude, by reason of the appropriation and taking of the lands hereinbefore described for railroad purposes.

9. There is filed herewith a transcript of the proceedings had before the Sheriff of Pottawattamie County, Iowa, in the proceeding before him pertaining to the lands hereinbefore described.

Wherefore, plaintiff prays that upon the trial of this cause the damages sustained by the lands of Archie C. Stude, by reason of the appropriation of the lands hereinbefore described, be fixed at not to exceed $10,000, and that plaintiff have such further relief as may be just and proper under the circumstances.

EXHIBIT "A"

of said Complaint was a

NOTICE OF APPEAL FROM ASSESSMENT OF DAMAGES

by Chicago, Rock Island and Pacific Railroad Company

This notice was addressed to G. R. Stuelke, Sheriff of Pottawattamie County, Iowa, and Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa. It bore an acceptance of service by said sheriff on March 6, 1952, recited that the railroad company "has appealed and does hereby appeal from the award of damages made by Sheriff's Commissioners on or about February 12, 1952, in the amount of $23,336.60 for the taking and appropriation for railroad purposes of the lands described" in Par. 4 of the Complaint. It was signed by counsel for Chicago, Rock Island and Pacific Railroad Company, and recited that the appeal was taken to the United States District Court for the Southern District of Iowa, Western Division, and "will be docketed in the office of the clerk

of said court at Council Bluffs, Iowa, on or before the 7th day of March, 1952."

On the same date there was filed in the office of the clerk the following

TRANSCRIPT ON APPEAL

I, G. R. STUELKE, Sheriff of Pottawattamie County, Iowa, do hereby certify that on the 18th day of January, 1952, there was filed in my office an Application for condemnation by Chicago, Rock Island and Pacific Railroad Company, which applicant for condemnation stated that it is a corporation organized under the laws of the State of Delaware, duly qualified as a foreign corporation to do business in the State of Iowa, and is the owner of certain lines of railroad within the State of Iowa. Applicant further stated that it had been authorized by the Interstate Commerce Commission to construct approximately thirty-four (34) miles of new railroad line in Cass and Pottawattamie Counties, Iowa; that it had theretofore applied for and received from the Iowa State Commerce Commission authority to condemn and appropriate for railroad purposes certain lands more particularly described.

Said Application specifically stated:

"(6) Archie C. Stude, whose post office address is R. 1, Hancock, Iowa, is the record owner of the following described property, to-wit:

> The Northwest Quarter (NW¼) of the Northwest Quarter (NW¼); the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼); and the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼), all in Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West, in Pottawattamie County, Iowa, containing in all approximately one hundred fifty-four acres, more or less.

William Lumpkin, whose post office address is RFD 1, Hancock, Iowa, is in possession of the real estate above described, and upon information and belief, applicant states that he occupies same as a tenant of the record owner. Pottawattamie County, Iowa, is a holder of a lien on the property above described for general taxes for the year 1951 due and payable in 1952.

Of the lands above described applicant seeks to condemn the following portion for railroad purposes, to-wit:

That part of the North Half (N½) of Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West of the Fifth P. M. in Pottawattamie County, State of Iowa, described as a strip of land One Hundred Fifty (150) feet in width, being Seventy-five (75) feet on each side of the relocated main track centerline of Chicago, Rock Island and Pacific Railroad Company as now staked and located over and across the North Half (N½) of the Northeast Quarter of said Section Twenty (20), and Two Hundred Fifty (250 feet in width, being One Hundred Twenty-five (125) feet on each side of said relocated main track centerline over and across the North Half (N½) of the Northwest Quarter (NW¼) of said Section Twenty (20), which relocated main track centerline is more particularly described as beginning at a point in the East line of said Section Twenty (20), Seven Hundred Sixty-two and Five Tenths (762.5) feet South of the Northeast corner thereof and extending Northwesterly in a straight line to a point in the West Line of said Section Twenty (20), Five Hundred Thirty-one and Eight Tenths (531.8) feet South of the Northwest corner thereof and containing in all Twenty-four and Forty-seven Hundredths (24.47) acres, more or less.

Of the lands above referred to four and fifty-six hundredths acres are located in the Northeast Quarter (NE¼) of the Northeast Quarter (NE¼); four and fifty-six hundredths acres in the Northwest Quarter (NW¼) of the Northeast Quarter (NE¼); seven and sixty-seven hun-

dredths acres in the Northeast Quarter (NE¼) of the Northwest Quarter (NW¼); and seven and sixty-eight hundredths acres in the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼), all in Section Twenty (20), Township Seventy-six (76) North, Range Forty (40) West, in Pottawattamie County, Iowa."

On the 28th day of January, 1952, a notice of hearing before Commissioners was served by me on Archie Stude, William Lumpkin and Pottawattamie County, Iowa, copy of which notice is hereto attached and made a part hereof.

I do further certify that I appointed the following named persons, all resident freeholders of Pottawattamie County, Iowa, and not interested in the question presented in said Application, or in any similar question, as Commissioners to assess and appraise the damages; (Here follow the names of six Commissioners.)

I do further certify that the Commissioners above named viewed the premises hereinbefore described on the 12th day of February, 1952, at 9:30 o'clock a. m., and on said date filed in my office in writing as follows:

"AWARD OF COMMISSIONERS

We, the undersigned, Commissioners appointed by the Sheriff of Pottawattamie County, Iowa, to assess and appraise the damages to real estate in Pottawattamie County, Iowa, by reason of the condemnation of lands for railroad purposes by Chicago, Rock Island and Pacific Railroad Company, under the application filed in the office of the Sheriff of Pottawattamie County on January 18, 1952, do hereby make our report and award in writing as follows:

Pursuant to our appointment, each of the Commissioners so appointed by you, duly qualified on the 11th day of February, 1952, by taking and subscribing an oath in writing before the Clerk of the District Court of Pottawattamie County, Iowa, that each of us would to the best of his ability faithfully and impartially assess and appraise the damages to real estate in Pottawattamie County, by reason of the appropriation of lands for rail-

road purposes under said application, and make written report thereof to the Sheriff.

On the 12th day of February, 1952, at 11:00 A. M., we viewed the real estate described in subdivision (6) of paragraph 7 of the application for condemnation on file in the office of the Sheriff of Pottawattamie County, and heard the claims and statements of the applicant, record owner, Archie C. Stude, and William Lumpkin, tenant of the record owner. We do now and hereby report that we have assessed the damages to the real estate specifically described in subdivision (6) of paragraph 7 of the application, by reason of the appropriation and condemnation of the lands specifically sought to be condemned for railroad purposes, as follows:

For damages to the interest of Archie C. Stude, record owner, $23,868.60; for damages to the interest of William Lumpkin, tenant of the record owner, $1,000.00.

The award herein made is subject to the lien of Pottawattamie County, Iowa, for unpaid general taxes and any unpaid personal taxes of the record owner.

The above and foregoing award is made on the condition that applicant for condemnation shall construct and maintain an opening beneath any roadbed or track constructed on the premises eighty-four (84) inches in diameter to be located at the following described point, to-wit:

Approximately 1200 feet West of the East line of the real estate specifically described in subdivision (6) of paragraph 7 of the application.

The award herein made is subject to the lien of Pottawattamie County, Iowa, for unpaid general taxes and any unpaid personal taxes of Archie C. Stude, record owner.

In Witness Whereof, the undersigned, Commissioners, have hereunto subscribed their names at Council Bluffs, Iowa, this 13th day of February, 1952."

I do further certify that on the 6th day of March, 1952, there was served upon me a Notice of Appeal by

Chicago, Rock Island and Pacific Railroad Company, copy of which is hereto attached and made a part hereof, and that on the 7th day of March, 1952, I made service of said Notice of Appeal on Archie C. Stude and William Lumpkin by delivering to them a true copy thereof and offering to read to them the original, which they waived, in Pottawattamie County, Iowa, and that I served the Notice of Appeal upon Pottawattamie County, Iowa, by delivering a true copy thereof to Arthur W. Biesendorfer, County Auditor of Pottawattamie County, Iowa, and by offering to read to him the original, which he waived.

In Witness Whereof, I have hereunto set my hand this 7th day of March, 1952.

(Sgd.) G. R. Stuelke,
Sheriff of Pottawattamie County, Iowa

The Notice of Appraisal and Hearing Before Commissioners referred to in said transcript was in form required by the statutes of Iowa, was addressed to Archie C. Stude, William Lumpkin, Hancock, Iowa, and to Pottawattamie County, Iowa, and notified all persons interested that a Commission has been appointed as provided by law by the Sheriff of said County for the purpose of appraising the damages which will be caused to the lands described by the condemnation of the lands described (description same as in Par. 4 of Complaint).

Summons was issued by the Clerk of the United States District Court for the Southern District of Iowa on March 7, 1952, addressed to Archie C. Stude, William Lumpkin and Pottawattamie County, in the usual form, citing the defendants named "to answer the Complaint copy of which is herewith served upon you within twenty days after service of this summons upon you."

The Summons with return of service thereon was filed in the office of the Clerk of said Court on March 25, 1952. The return of service recited that the Summons was received by the marshal on March 17, 1952, and was

served together with copy of the Complaint upon each of the defendants on March 18th, 1952.

On March 24, 1952, there was filed in the office of the Clerk the following

MOTION TO DISMISS

Come now the defendants Archie C. Stude, and William Lumpkin, and for Motion to Dismiss plaintiff's complaint, respectfully state to the Court, as follows:

1. There is no statutory authority for an appeal to the United States District Court from the proceedings in eminent domain before the Sheriff of Pottawattamie County, as set forth in plaintiff's notice of appeal and complaint.

2. Plaintiff's notice of appeal and complaint show that plaintiff has heretofore elected its remedy by proceeding under Chapter 472 of the Code of Iowa, 1950, as alleged in paragraphs 4 and 5 of plaintiff's complaint, and the award of the condemnation jury has become final as provided by Section 472.17 of the Code of Iowa, 1950.

3. The amount of the award of the condemnation jury as set forth in the complaint, has been deposited with the Sheriff of Pottawattamie County, Iowa, as provided by Section 472.25 of the Code of Iowa, 1950, in order that plaintiff might obtain possession of said property as provided by said statute and said Sheriff holds said deposit subject to the provisions of Chapter 472, Code of Iowa, 1950, as shown by the affidavit of said Sheriff attached hereto and made a part hereof.

4. Plaintiff has heretofore elected to appeal from the award of the condemnation jury as set forth in the complaint to the District Court of Iowa, in and for Pottawattamie County, as provided by Chapter 472, Code of Iowa, 1950.

5. Plaintiff has filed a petition for removal of the appeal to the District Court of Iowa in and for Potta-

wattamie County, being Docket No. 1-101, to the United States District Court for the Southern District of Iowa, Western Division, and has elected to proceed as required by Chapter 472, Code of Iowa, 1950.

6. That this Court has no jurisdiction of the alleged claim set forth in the complaint.

AFFIDAVIT

State of Iowa, Pottawattamie County, ss.

I, G. R. Stuelke, being first duly sworn on oath depose and state:

That I am the Sheriff of Pottawattamie County, and have been such official at all times herein mentioned.

That on January 18, 1952, Chicago, Rock Island & Pacific Railroad Company instituted proceedings in accordance with the provisions of Chapter 472, Code of Iowa 1950, and filed written application for the condemnation of private property belonging to Archie C. Stude and William Lumpkin; and pursuant to said application and in conformity with the provisions of Chapter 472, Code of Iowa 1950, I caused to be appointed six (6) resident freeholders of Pottawattamie County, Iowa, as a Commission to assess and appraise the damages.

That I caused to be served upon Archie C. Stude and William Lumpkin, notice of hearing before said commissioners.

That pursuant to said application and notice, the commissioners appointed by me qualified pursuant to the provisions of Chapter 472, Code of Iowa 1950; and on February 12, 1952 said commissioners filed their written award in my office, at which time they awarded to Archie C. Stude, record owner, the sum of $23,886.00, and awarded William Lumpkin, tenant, the sum of $1000.00.

That thereafter and in the manner provided by Chapter 472, Code of Iowa 1950, Chicago, Rock Island & Pacific Railroad Company, paid into my office said damages so awarded by the commissioners; and that I hold in my hand check of the Chicago, Rock Island & Pacific Railroad Com-

pany, * * * for Archie C. Stude, in the amount of $23,-886.00, and William Lumpkin $1000.00.

G. R. Stuelke

(Duly verified.)

On March 24, 1952, there was filed in the office of the Clerk, by Defendants Stude and Lumpkin the following

ANSWER AND COUNTERCLAIM

Come now the defendants Archie C. Stude and William Lumpkin, subject to the ruling on their motion to dismiss, and in compliance with the Statutes of Iowa, and in answer to plaintiff's complaint, state:

DIVISION ONE

1. They admit paragraph 1, thereof.
2. They admit paragraph 2.
3. They admit paragraph 3.
4. They admit paragraph 4.
5. They admit paragraph 5.
6. They admit that plaintiff caused to be served upon them certain documents designated as notice of appeal.
7. Defendant Archie C. Stude admits that he is the owner of the real estate described in paragraph 7; he avers that same contains 160 acres; that 24.47 acres have been taken by the plaintiff and avers that he has been damaged thereby in a sum in excess of $32,000.00 as will be hereinafter set out.
8. They deny paragraph 8.
9. They admit paragraph 9.

DIVISION TWO

For further answer by way of counterclaim, these defendants state:

COUNT ONE

1. That the farm before described was for many years the home of Archie C. Stude and is now operated by Wil-

liam Lumpkin; said renter being the husband of his only child. That it has an excellent and modern house, with other valuable improvements, replacement value of which would be more than $20,000.00. That the same is on an all-weather road and at all times has been adapted and suitable for use and operation as a combination stock and grain farm and has been so used and operated continuously for many years.

2. That the said right-of-way cuts through substantially the middle of said farm, in a northwesterly direction. That all of the buildings are on the north side of the right-of-way, which takes part of his feed lot. That his farm, with said right-of-way through it, is divided into two strips each of which are a mile long and only about 500 feet wide.

3. That for the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speeds of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully compete with their competitors between Chicago and Denver, all of which was alleged to be impossible under present conditions, the plaintiff by condemnation proceedings under Iowa law and through the medium of a sheriff's jury, has taken the land and severed the farm as before stated.

4. That prior to the taking of said right-of-way, their farm was a one-man, stock and grain farm located on an all-weather road, had excellent school facilities and was a highly desirable farm on which to live, being equipped with all modern conveniences.

5. That by reason of the taking of said right-of-way, the defendants have sustained damages in the sum of $32,000.00.

6. That the defendant Archie C. Stude and the defendant William Lumpkin are operating said farm as a joint venture, and are doing so both as to livestock operation and to grain-raising operations.

7. That defendants allege that they are not able at this time to enumerate all of the items that go to make up the damages to the farm as a whole sustained by said condemnation but allege that among such are included the following items which are elements of damage reducing the value of the farm:

a. The taking by the plaintiff of 24.47 acres of the best land.

b. Making the farm absolutely unsalable to a large number of potential buyers by reason of the construction through the farm of a high-speed line and destroying all value as a home.

c. Requiring the taking out of production of a strip not less than one rod wide on each side of the right-of-way, containing at least four acres and increasing the labor and expense of cutting weeds along additional fences along the right-of-way.

d. Destroying defendants' source of water supply and making it necessary for him to supply water for livestock and other farm purposes upon the parcel of land south of said right-of-way.

e. Making the farm usable only as two separate units, one of which has no buildings. The farm buildings now being located on the tract of land one mile long and 500 feet wide north of the right-of-way and the remainder of the farm of the same size and shape is severed from said buildings.

f. Limiting and making difficult the free movement about the farm of portable buildings and machinery.

g. Rendering the farm a very undesirable place to live by reason of the noise, vibration, soot, dirt and danger to children and also by increasing the hazards of fire. That the vibration will greatly impair the use of electrical instruments and the sounds of the locomotives at all hours disturb the sleep of all occupants.

h. Place on the farm a constant and perpetual source of danger to everyone having occasion to go from the land on one side to the other and by limiting to careful and alert adults those who can be entrusted to drive live-

stock and haul portable buildings and machinery from one part to the other.

i. Increasing the danger and probability of importation to the farm of noxious weeds and plant and animal diseases.

j. Interference with drainage of the farm and making contouring impossible because of the shape of the parcels remaining, creating ditches by diverting surface water into culverts instead of sheet run-off thus encourage erosion.

k. Greatly increasing the cost and labor of operation.

l. Necessitating the very dangerous crossing of the railroad line many times each day in normal operations.

m. Decreasing the desirability of the farm to good tenants and operators and making it definitely difficult to obtain and retain such.

n. Decreasing the rental and sale value of the farm.

o. Destroying the suitability of use for a stock and grain farm.

p. By necessitating the travel between the lands on each side to be over one way or road way, this increasing erosion and rendering such way unusable for crop purposes.

6. Defendant Archie C. [illegible] requests a jury trial to assess his damages.

COUNT TWO

1. That the defendant William [illegible], at the time of the condemnation proceedings, was a tenant upon the real estate described before. That he was operating said farm as a joint venture with the defendant Archie C. [illegible].

2. That for the alleged purpose of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speeds of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully compete with their competitors between Chicago and Denver, all

[illegible]

4. That by reason of the taking of said right-of-way, defendant William Lumpkin has been damaged in the sum of $2500.00.

A. Defendant William Lamplin requests a jury trial to assess his damages.

Wherefore, defendants pray that defendant Archie C. Wade be allowed the sum of $[illegible] by reason of his damages as set out in Count One; that defendant William Lamplin be allowed damages in the sum of $[illegible] by reason of his damages as set out in Count Two; [illegible] and further pray that each be allowed interest on the amount awarded at 6% from February 18, 1965 and costs of this action including attorneys' fees for their attorneys.

Thereafter an Order was entered by the Court assigning

DEFENDANTS' MOTION TO DISMISS

for hearing at Des Moines, Iowa, on May 28, 1965, at which time the cause was orally argued and the parties were given until June 7, 1965 to file written briefs.

On January 14, 1965, the following

AFFIDAVITS

of Philip J. Wilson and G. E. Steele were filed in the office of the Clerk.

State of Iowa, Pottawattamie County, ss.

I, PHILIP J. WILSON, being first duly sworn on oath, depose and say that I am one of the attorneys for the defendants in the above entitled cause.

That on the 13th day of March, 1964, a Petition for Removal was filed in the office of the Clerk of the above entitled court, docketed as Civil Case No. [illegible], praying to remove to this Court herein a cause of action which had been instituted in the District Court of Iowa, in and for Pottawattamie County, Iowa, at Avoca, wherein the defendants herein are named as plaintiffs, and the plaintiff herein is named as defendant; that said action involves an appeal from the same award made by the Sheriff's Jury and the same lands as are involved in the complaint herein; that Notice of Appeal from said award

by the Sheriff's Deed of the District Court of Iowa in and for Pottawattamie County, Iowa, was served on the [redacted] day of March, 1962, and [redacted] transcript of the proceedings [redacted] filed with said District Court of [redacted] March, 1962, and that after the [redacted] entered the parties named as [redacted] and entered to demand said action to [redacted]

[redacted] Pottawattamie County, ss.

I, A. [redacted] being first duly sworn on oath, depose and say:

That I am the Sheriff of Pottawattamie County, Iowa, and [redacted] duly elected at all times hereinafter mentioned.

That [redacted] of the award entered in favor of [redacted] for the property involved herein by the Board of Conciliators on February 11, 1962, was [redacted] on February 28, 1962, under the provisions of Chapter 471 of the Code of Iowa, 1962.

[redacted]

On July 13, 1962, the Court filed and entered of record the following:

United States District Court, Southern District of Iowa, Western Division

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CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, et al, *Defendants.*	Civil Nos. 1-80 to 1-83, Inclusive, Civil Nos. 1-85 to 1-90, Inclusive,

and

ALVA F. CARBUHN, et al, *Plaintiffs,* vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al, *Defendants.*	Civil Nos. 1-91 to 1-101, Inclusive, (Consolidated for Ruling) MEMORANDUM OPINION AND ORDER

There has been no order of consolidation of the twenty separate cases here involved, but since the motions to dismiss in ten of them and the motions to remand in the remaining ten make them companions, they will be treated as consolidated for the purpose of the motions and the present rulings thereon.

All of the cases are related to condemnation proceedings commenced by the Chicago, Rock Island and Pacific Railroad Company as condemnor of lands in Pottawattamie County taken under the power of eminent domain in the change of location of its line of railroad between Atlantic and McClelland, Iowa.

In January, 1958, pursuant to authority granted by the Iowa State Commerce Commission so to condemn (Sec. 471.10, Code of Iowa, 1950), the condemnor instituted proceedings under Chapter 472 of the Code of Iowa, 1950, by filing with the sheriff of Pottawattamie County a written application conformed to Sec. 472.2. The sheriff appointed a commission, which assessed the damages as to each tract involved and filed its written report with him. The ten tracts are owned by nine different property owners.

Condemnor served notice of appeal from the awards, as permitted by Sec. 472.18, docketing the several notices of appeal as ten separate cases in the District Court of the State of Iowa in and for Pottawattamie County. *Thereafter*, condemnor, under the claimed authority of Tit. 28, Sec. 1441(a), United States Code, filed in this

court petition for removal of each of the ten cases, which are docketed separately here. The petitions for removal are in the form. In each of these cases the landowner has filed a motion to remand, claiming in each that this court "is without jurisdiction either to determine or pass upon any further question" in the case, and that the appeal pending in the state court "is not removable to this court for the reason that the Chicago, Rock Island and Pacific Railroad Company is not the defendant in said action within the meaning of Section 1441 of Title 28, United States Code, so as to be entitled to remove said action." Contemporaneously with the motion to remand, each property owner has attempted to comply with Sections 472.21-.22 of the Iowa Code by filing what is denominated a "petition," in which the owner is designated as plaintiff, and which is filed "subject to the ruling on his motion to remand this action to the District Court of Iowa, and in compliance with the Statutes of Iowa." Sections 472.21-.22 are as follows:

> "472.21. *Appeals—how docketed and tried.* The appeal shall be docketed in the name of the owner of the land, or of the party otherwise interested and appealing, as plaintiff, and in the name of the applicant for condemnation as defendant, and be tried as in an action by ordinary proceedings."
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> "472.22. *Pleadings on appeal.* A written petition shall be filed by the plaintiff on or before the first day of the term to which appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper."

Prior to docketing in the state court the several appeals just described which were removed to this court, the condemnor caused to be served on the sheriff as to each tract of land involved a "Notice of Appeal from Assessment of Damages by Chicago, Rock Island and Pacific Railroad Company." It was addressed to the sheriff and the landowner, informed each of the con-

demnor's appeal, and recited: "Said appeal is taken to the United States District Court for the Southern District of Iowa, Western Division, at Council Bluffs, Iowa, and will be docketed in the office of the Clerk of said Court." These notices were docketed in this court, along with a complaint contemporaneously filed in each case, wherein the condemnor named itself as plaintiff and the landowner as defendant and alleged requisite diversity and amount in controversy, authority to construct the new line of railroad, appropriate authority from the Iowa State Commerce Commission to proceed by condemnation, the institution of the proceedings before the sheriff of Pottawattamie County, the appointment of the commissioners, their report and the appeal from the award and assessment of damages by serving the notice (a copy is attached to each complaint), a description of the premises involved, the actual damages claimed to be sustained by the taking of the lands and the award of the commissioners. A transcript of the prior proceedings is attached to the complaint. The prayer of the complaint is, "that upon the trial of this cause the damages sustained by the lands" be fixed at not to exceed an amount named and that the plaintiff have further "just and proper relief."

To each of these ten complaints filed as original suits in this court, the landowners, as defendants, filed motions to dismiss, asserting lack of statutory authority for the appeal to this court, the condemnor's previous election to proceed in the state court by instituting the proceedings before the sheriff as alleged in the complaint, with the consequent finality of the award of the condemnation jury, the deposit of the amount of the award with the sheriff to obtain possession of the property, the election to appeal from the condemnation award to the state court, the filing of the petition for removal from the state court to this court (as disclosed by the removal proceedings in the ten cases recited above), the consequent election to proceed as prescribed by the law of Iowa and that this court is without jurisdiction of the alleged claim. These respective motions to remand and

to dismiss were orally argued and written briefs have been filed.

The court will first consider the landowners' motions to dismiss the complaints in the ten cases originally docketed in this court as direct appeals from the commissioners' awards.

I.

The condemnor contends that before August 1, 1951 (the effective date of Rule 71A of the Federal Rules of Civil Procedure) the condemnor had the right of appeal from the award by the sheriff's commission directly to this court; that since August 1, 1951, Rule 71A(k) provides the specific procedure for the exercise of the right of such appeal. Subsection (k) is as follows:

> "*Condemnation Under a State's Power of Eminent Domain.* The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed."

In support of the claimed right of direct appeal to this court, condemnor's counsel cite *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239. That action was an original suit in equity by the mining company to enjoin the state court from proceeding to have lands condemned in a case instituted in the county court of Kentucky despite the fact of removal of the proceedings to the Federal Circuit Court. The Traction Company, authorized by law and its charter to construct an electric railroad, had filed its application in the County Court for appointment of commissioners to assess damages for the taking of private property. The Kentucky statutes prescribing this procedure provided for appeal by either party to the Circuit Court and trial de novo there by jury of the amount of compensation. Commissioners were appointed who made an award of $100.00 to the Mining

Company. Before any action on the award, the landowner petitioned for removal to the Circuit Court of the United States, alleging requisite diversity of citizenship and amount. The County Court refused to recognize any right of removal and was about to proceed when the landowner sued in equity in the Circuit Court of the United States for injunction. The Traction Company demurred to the bill, urging lack of jurisdiction and authority in the Circuit Court. The demurrer was overruled. The Traction Company elected to stand on the ruling. Injunction was issued enjoining the Traction Company from proceeding further in the County Court. The opinion is not authority for the condemnor's claim here. It recognizes that the proceeding commenced in the County Court, and removed to the federal court, was already a "suit" or "controversy between citizens of different States" within the meaning of the Constitution and laws of the United States. That is because the condemnation proceeding under Kentucky law was required to be commenced as a suit in the County Court. That court was asked to appoint commissioners to assess the damages to which the landowner was entitled. Such was the statutory method provided for condemnation. The opinion recognized that "After the removal of a case of condemnation from a state court the Federal court would proceed under the sanction of state legislation." Referring to judicial power to be exercised by the courts of the United States, the opinion said, at page 255:

> "In the exercise of that power a Circuit Court of the United States, sitting within the limits of a State and having jurisdiction of the parties, is for every practical purpose, a court of that State. Its function, under such circumstances, is to enforce the rights of parties according to the law of the State, taking care, always, as the State courts must take care, not to infringe any right secured by the Constitution and the laws of the United States."

It is true that the opinion overrode the contention that the case was not removable until it had been taken by

appeal from the County Court to the State Circuit Court where it would be "tried" de novo. This is understandable because of the previous expression in the opinion, p. 251, "that the case presented in the County Court was a 'suit' or 'controversy' between citizens of different States, within the meaning of the Constitution and the laws of the United States. It was, as already said, a judicial proceeding initiated in a tribunal which constitutes a part of the judicial establishment of Kentucky as ordained by its constitution, Const. Kentucky, Sec. 140; and the court, although charged with some duties of an administrative character, is a judicial tribunal and a court of record." Here the sheriff's commission, appointed under the Iowa statutes and from whose award the appeal is taken to this court, is but an administrative body and in no sense a judicial tribunal.

Considering statutes identical in substance, the Supreme Court of Iowa, speaking through Ladd, C. J., in *Myers vs. Chicago & N. W. Ry. Co.*, 118 Iowa 312, 315, said:

> "From these statutes it plainly appears that the proceeding before the commissioners appointed by the sheriff to appraise the land *is not a suit at law, but in the nature of an inquest to ascertain its value.* No hearing is had, and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far then the proceeding *is in no respect a suit.*" (Emphasis supplied.)

The opinion further says, at page 316:

> "Unless in court, or before those exercising judicial functions, the proceeding cannot be regarded as a suit (citing cases). That the proceedings to condemn land is not a suit, within the language of the Removal Acts of Congress, and are such after the appeal to the district court, seems to be conclusively settled against the appellees in Boom Co. vs. Patterson, 98 U. S. 403, and Railroad Co. vs. Myers, 115

U. S. 1. See also Searl vs. School District, 124 U. S. 197. In the first cited case the court said, speaking through Field, J.: 'The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law, in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was compensation to be made to the owner of the land,—in other words, the value of the property taken. No other question was open to contestation in the district court. Turner v. Holleran, 11 Minn. 253. The case would have been in no essential particular different had the state authorized the company, by statute, to appropriate the particular land in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the state to the federal court, if the controversy were between the company and a citizen from another state, cannot be doubted.'"

Counsel for the condemnor argues that to avail itself of the exercise of the right of eminent domain granted to it by the State of Iowa, it pursued the administrative procedure provided by the laws of that State before it might come to this court, but that having progressed through the administrative procedure to the point of determination by the commissioners of the amount of the award for the taking of the land, it then had a controversy which, because of its diverse citizenship and the amount involved, permitted it to come by appeal directly to this court. It is believed that the authority upon which counsel relies for this statement is based upon situations where the condemnation proceedings were instituted in the county court or other tribunal which was a part of the judicial establishment of the state. The commission

of freeholders appointed by the sheriff is not a tribunal which is a part of the judicial establishment of the State of Iowa. It is a purely administrative body which, as said by Judge Ladd, conducts a proceeding in the nature of an "inquest" to determine the value of the land.

That such a condemnation body is not a court is also decided by the Court of Appeals of this Circuit. In 1909, the 33rd General Assembly of Iowa authorized the purchase of waterworks by cities under certain conditions. The valuation was to be determined by what was described as a "court of condemnation" to consist of three state district court judges appointed by the Supreme Court of Iowa. Such a "court" was appointed in connection with the proposed purchase of the local waterworks by the City of Des Moines, Iowa. Thereupon the water company, as plaintiff, filed its petition and bond for removal to the federal court, filing both in the Supreme Court and in the "court of condemnation." It then brought a separate action in the federal court to enjoin further proceedings, alleging that the Act and the appointment of the district court judges violated the Iowa Constitution, Article 5, Section 5, which provides that a district judge shall not "be eligible to any other office except that of judge of the Supreme Court, during the term for which he is elected." The complainant contended that the appointment of the district judges to sit in a "court of condemnation" was appointment of these judges to another office. A three-judge federal court denied the injunction. *Des Moines Water Co. v. City of Des Moines, et al*, 194 Fed. 557. On appeal, the Circuit Court affirmed. 296 Fed. 657. In commenting, the opinion said, p. 662:

> "There is nothing in this point. Although this body is called a court, the members thereof can be no more considered a judicial tribunal than can the six freeholders selected by the sheriff to perform similar duties."

As to the effect of removal to this court by notice to the court of condemnation, it was said:

"At the time the petition for removal was filed the proceeding was not then a 'suit,' within the meaning of the removal acts. * * * Kaw Valley Drainage Co. v. Metropolitan Water Co., 186 Fed. 315."

This is the only case found under Iowa procedure which appears to parallel the attempt of the condemnor to come to this court by direct appeal from the condemnation commission. The court can find no statutory or other satisfactory source of authority for such appeal. There is respectable authority for the proposition "that when a statute gives a new and extraordinary remedy, and directs how the right to the remedy is to be acquired or enjoyed, how it is to be enforced, the act should be strictly construed; and the steps pointed out for the enjoyment of the remedy provided should be construed as mandatory, rather than directory or optional." *Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co.*, 119 Fed. 209, quoting at page 216 from *Lumber Co. v. Hubbert*, 112 Fed. 718-725. (The Union Terminal case, decided in 1902 by the Circuit Court of the Western District of Missouri, was before a circuit and district judge. It involved a motion to remand proceedings for condemnation which had been commenced in the State Circuit Court and removed to the federal court.) Certainly the remedy here given—i.e., the means to exercise the right of eminent domain by a private corporation with the consent of the State of Iowa—is a "new and extraordinary remedy." The law giving the remedy directs how it shall be enjoyed. That law is to be strictly construed. The State is granting a modicum of its sovereignty. This court surely may not add to or subtract from the State's grant of such an extraordinary privilege.

It is contended that the new Rule 71A(k) now provides authority for such a direct appeal to this court. But we have seen that the proceedings do not take the form of a suit or, as now provided, a "civil action," until appeal from the commissioners' award has been taken and filed in accordance with the Iowa statute. For Rule 71A(k) to be construed as providing the authority to remove by this notice of appeal to this court, it would

be necessary to find that the rule-making power had in effect amended Sec. 1441(a) of Title 28, U. S. C. After the promulgation of the rule by the Supreme Court and the expiration of the sixty-day period before its effective date, surely it may not be argued that the effect was so to amend Sec. 1441 as to include or describe as a "civil action brought in a state court" the kind of proceeding here involved. This court will construe it so only when Congress has acted by direct expression, not by implied acquiescence. This court has limited jurisdiction expressly defined by the Congress. This Congressional grant is to be strictly construed. It is said in *Shamrock Oil Corp. v. Sheets*, 313 U. S. 100, 109:

> "'Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, 292 U. S. 263, 270; see Kline v. Burke Construction Co., 260 U. S. 226, 233, 234; Matthews v. Rodgers, 284 U. S. 521, 525; cf. Elgin v. Marshall, 106 U. S. 578."

There is another and, I believe, taken alone, a compelling reason why such an appeal is not and cannot be effective or permitted. The power of eminent domain appertains to and is an attribute of the right of sovereignty. It is to be exercised with due respect for constitutional rights and guaranties.

Iowa has delegated that power to those legislatively named when the authority is used for a declared purpose found to be in the public interest. It has so circumscribed the method of its use as to insure to its citizens due process of law and just compensation for the taking of their property.

The condemnor here availed itself of such delegated authority when it filed its application with the sheriff. The method of its exercise includes a right of appeal to the District Court of the proper county by any party aggrieved by the commissioners' award. It would be an unwarranted encroachment on the State's authority for this court to find and declare that the prescribed pro-

ceedings, despite their expressed and explicit detail, contemplate and permit an appeal from the commissioners' award directly to this court instead of to the court named by the General Assembly of Iowa.

When it filed its application for condemnation, this condemnor undertook to avail itself of the privilege of eminent domain delegated to it by the State of Iowa. If condemnor is to enjoy and exercise that privilege it must pursue the method which the State has prescribed for its use. After the prescribed administrative procedure is concluded, and when the matter has ceased to be an inquest to ascertain value and has taken the form of a civil action to be heard and determined in a court of justice, the situation and relationship of the parties then may permit a choice of the forum in which the judicial controversy may be determined. Then, and not until then, will the ordinary rules and incidents of a civil action apply. *Boom Co. v. Patterson*, 98 U. S. 403.

The Iowa statute, Sec. 472.20, provides for filing the appeal with the clerk of the State District Court, and if condemnor is to avail itself of the right of appeal and have the amount determined "as in an action by ordinary proceedings," it must follow the mode prescribed. There is nothing in the Iowa or the federal statutes, or in the adjudicated cases that we have found, or in Rule 71A, which permits a condemnor to bring the commissioners' award directly to this court for review by service of notice of appeal upon the sheriff and the landowner, as here attempted.

Therefore, the motions to dismiss the complaints in the ten actions separately docketed in this court will be sustained.

II.

The landowners seek to have remanded the ten cases brought here upon petition for removal from the State Court. They claim that this court is without jurisdiction and the cases may not be removed here because the condemnor is not the defendant within the meaning of Sec. 1441(a) of Tit. 28, U. S. C.

The landowners depend primarily on *Mason City R. R. Co. v. Boynton*, 204 U. S. 570. In that case, where four questions were submitted by the Court of Appeals of this Circuit, among which was the first proposition discussed in this memorandum, the court determined only one, which was stated thus: "Was the landowner a defendant within the meaning of the removal statute, when the suit was removed into the Circuit Court?" The opinion holds that the landowner was such a defendant and sustained the removal. In doing so the writer of the opinion said, after discussing a state decision urged to the contrary:

> "But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which for the purposes of removal this court might think the proper ones to be applied. In condemnation proceedings the words plaintiff and defendant may be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors: one to acquire title, the other to get as large pay as he can. It is not necessary in order to decide that the present removal was right to say that the state decision was wrong. We leave the latter question where we find it. But we are of the opinion that the removal in this case was right * * *." (Emphasis supplied.)

It is true that the opinion held that in a board sense the railroad is the plaintiff because the institution and continuance of the proceeding depend upon its will. The opinion is authority for the statement that the designation given the parties by the state statute is not conclusive, nor is the alignment of the parties as made by the parties themselves binding on this court, and this court must construe the act regarding removal. The authority of the Boynton case is fully recognized and accepted. Twice before the question of removal by the con-

demnor, of proceedings commenced in the District Court of the State of Iowa has been considered and approved by this court. *Kirby v. D. & N. W. R. Co.*, 106 Fed. 651; *Rogerio v. Miss. Riv. Power Co.*, 202 Fed. 771. In each case this court overruled the motion to remand. In each case the landowner appealed to the State District Court from the commissioners' award and the condemnor instituted removal proceedings and came to this court. The Kirby case antedated the Boynton case. In his opinion my predecessor said, at page 554:

> "I add the statement—to me of little importance, and certainly not controlling—that the Iowa statute, in providing for the appeal, recites, 'The landowner shall be plaintiff and the corporation defendant.' I cite this to show that the company is at least called a defendant. But I think it is an actual defendant, in view of the situation of the parties before the state district court."

In answer to the contention of counsel for the landowners that "this was a kind of special proceeding, and one that could not have been brought in this court originally, and therefore cannot be removed here," the same judge said, at page 557:

> "The Iowa statutes provide that a railway may appropriate a right of way. It must first pay or secure the damages. It has paid, or should if it has not, the amount fixed by the commissioners. That debt, it has the right to enter upon and occupy the strip of land. Until that sum is increased by another tribunal having jurisdiction, such occupancy is good. When increased, such additional money must be paid. If it is finally, such decrease is withdrawn. Therefore the only controversy is as to damages, and, there being a controversy on that question, and such controversy being between citizens of Iowa and Pennsylvania on one side, as plaintiffs, and the company, which is a defendant, and citizen of Illinois, on the other side, and the amount in controversy exceeding the requisite sum, the case was

removed from the state court to this court; and the removal was effected and was complete when the petition and bond was filed. Nothing further was to be done, excepting to timely file in this court, and that was done."

It is to be observed that in the Boynton case the court said at page 160:

"Looked at as a whole, the Iowa statutes provide a process by which railroads and others may acquire land for their purposes which the owner refuses to sell. The first step is the valuation. Whether it is part of the case or not, it is a necessary condition to the proceedings in court. Against the will of the owner the title to the land is not acquired until the case is decided and the price paid. The intent of the railroad to get the land is the mainspring of the proceedings from beginning to end, and the persistence of that intent is the condition of their effect. The State is too considerate of the rights of its citizens to take from them their land in exchange for a mere right of action. The land is not lost until the owner is paid. Therefore, in a broad sense, the railroad is the plaintiff, as the institution and continuance of the proceedings depend upon its will. Hudson River Railroad & Terminal Co. v. Day, 54 Fed. Rep. 545." (Emphasis supplied.)

The emphasis in the foregoing quotes is significant. In the cases at bar the "taking" is accomplished. The condemnor has paid the award to the sheriff and is occupying the land. Therefore, the land is "lost" to the owner and the situation of the parties is completely changed from that which existed in the Boynton case. "The intent of the railroad to get the land" is no longer "the mainspring" of the proceedings. The condemnor (the railroad) has the land, and although it is the condemnor who has appealed from the award, the purpose of the landowner yet is "to get as large pay as he can." Nothing else will be before the court. As was said in the Kirby case, "The only controversy is as to damages," and it is between citizens of different states. Looking at

the position of the parties in the title and into the nature of the litigation and the relations of the parties to the lands in controversy, we find that the one nominally the plaintiff is in fact the plaintiff, and the one nominally the defendant is in fact the defendant. The plaintiff under the Iowa statutes, Sec. 472.11-28, files his written petition "stating specifically the items of damage and the amount thereof," and the defendant condemnor files a written answer thereto. It is true that the amount of the commissioners' award may be refused to plaintiff's detriment. But it is also true that the proceedings are open for an award against the condemnor for an amount in excess of that of the commissioners. The landowner is entitled to as large pay as he can get from the condemnor. For every practical purpose at time of removal in these cases at bar the condemnor is both nominal and actual defendant.

III.

The right to remove proceedings to this court applies to actions which could have been brought in this court in the first instance. Sec. 1441, Tit. 28, United States Code.

An action to condemn land is a civil action within the meaning of this section and may be brought in the federal court of the district in which the land lies. *Fremont v. Chicago M. & St. P. Ry. Co.*, 276 Fed. 370; *Boom Co. v. Patterson*, 98 U. S. 403.

We have the direct question, therefore, whether, requisite diversity and amount existing, Rule 71A now provides to this condemnor the means initially to proceed in this court. If it does, then has condemnor the option either to proceed as was done in these cases by filing its application with the sheriff of Pottawattamie County and pursuing the Iowa statutory remedies, and then coming to this court by removal proceedings after appeal to the State District Court from the award of the sheriff's commission; or, to proceed initially in this court by complaint filed here asking the appointment of commissioners to determine the amount of compensation, with consequent

right to either party to have the award redetermined by trial de novo of the issues before a petit jury."

It is recognized that Rule 71A is a rule of procedure and does not change substantive law. Tit. 28, Sec. 2072. It is declared in the order adopted April 30, 1951, by the Supreme Court, paragraph 2, that the new rule is "to govern condemnation cases in the United States District Courts." In subparagraph (a) it is stated that except as otherwise provided in this new rule, the Rules of Civil Procedure "govern the procedure for the condemnation of real and personal property under the power of eminent domain." If the action involves the exercise of the power of eminent domain under the law of the United States, then the trial is governed by subparagraph (h) of the new rule. If it involves the exercise of the power of eminent domain under the law of the state, then subparagraph (k) controls.

The effect of the rule, therefore, as I interpret it, is to provide for a condemnor undertaking to exercise the power of eminent domain under the law of a state, the means to proceed in this court in the first instance if jurisdiction resides here under Sec. 1332, Tit. 28, U. S. C. To hold otherwise would have the effect of depriving a citizen of another state of rights conferred upon him by Sec. 1332 to commence an action here. It would be equivalent to amending Sec. 1332 by inserting what we have underlined so that it would read thus: "The District Courts shall have original jurisdiction of all civil suits *except those involving the exercise of the power of eminent domain* where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between: (1) Citizens of different states."

If it should be contended that the Iowa State Commerce Commission might condition its right to the issuance of the permit provided by Sec. 471.10 of the Code of Iowa, 1950, to require that a condemnor should initiate his proceedings by filing the application with the sheriff of the county in which the land is located, as provided by Sec. 472.3 of the Iowa statutes, the answer is, that if

the condemnor has the right to proceed in the first instance in the federal court, that right may not be taken away by a condition sought to be imposed by the Commerce Commission, or by the Legislature. That is clearly stated in *Traction Co. v. Mining Co.*, supra, p. 252:

> "Speaking generally, it is for the State, primarily and exclusively, to declare for what local public purposes private property, within its limits, may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken. But the State may not prescribe any mode of taking private property for a public purpose and of ascertaining the compensation to be made therefor, which would exclude from the jurisdiction of a Circuit Court of the United States a condemnation proceeding which in its essential features is a suit involving a controversy between citizens of different States."

One having the right to come here initially in condemnation proceedings surely cannot go partly down the road of the state procedure and then cut across from the sheriff's commissioners' award to this court. There is no such path defined. It was said earlier in Division I that there is no authority for such action. It is perhaps better said that Rule 71A is authority *against* such action. Whether Rule 71A provides an *exclusive* remedy in a diversity case, and one failing to proceed initially in this court loses the right of removal by the election to pursue the state statutory procedure, may be arguable, but until it has been expressly declared to be an exclusive remedy this court is unwilling to deprive a nonresident of his right to come here under the authority granted by Sec. 1441(a) of Tit. 28, U. S. C.

To paraphrase *Traction Co. v. Mining Co.*, supra, page 253: "Under any other view a State, by its own tribunals, could deprive citizens of other States of their property by condemnation, without giving them an opportunity to protect themselves, in a National court, against local prejudice and influence."

IV.

In all candor, it should be said that the question of the right of removal of these cases has not lent itself to quick determination. A predecessor on this court may not have been inaccurate when he said "That there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them." *Hagerla v. Miss. Rec. Power Co.*, 262 Fed. 771. The complications presented by the privileges extended to a condemnor by Rule 71A(k), and by the first impression created by reading of the opinion in the Boynton case, supra, combined to cause some rather extended research. The court has been mindful of the purpose of the Congress in providing for the right of removal. As expressed in the Traction Company case, supra, a purpose and effect is to protect the non-resident "against local prejudice and influence."

This court has found itself strongly persuaded by what was so well phrased by the late Walter H. Sanborn, Judge of this Circuit, when, speaking of the right of removal, he said in *Bostmen's Bank v. Fritzlen*, 135 Fed. 650, 655:

> "That right is of sufficient value and gravity to be guaranteed by the Constitution and the acts of Congress. If it exists, and the Circuit Court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy. And the true rule is that motions to remand and for removal should be decided, not by the existence of doubts, but by the preponderance of the facts, the law, and the reasons which condition them, in view of the fact that the right to invoke the jurisdiction of the federal court is a valuable constitutional right, and an erroneous affirm-

ance of the claim to that right may be corrected by the Supreme Court upon a certificate of the question of jurisdiction, while an erroneous denial of the claim is remediless."

Orders for judgment of dismissal will be prepared and filed in Nos. 1-80 to 1-83, inclusive, and Nos. 1-85 to 1-90, inclusive. Orders overruling the motions to remand will be prepared and filed in Nos. 1-91 to 1-101, inclusive. Exceptions to adverse rulings will be allowed to all parties.

Signed at Des Moines, Iowa, this 19th day of July, 1952.

/s/ Wm. F. Riley,
United States District Judge

On July 23, 1952, the Court made and entered of record the following

ORDER

in said cause:

United States District Court, Southern District of Iowa, Western Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, et al, *Defendants*. (and other cases as here numbered)	Civil Nos. 1-80 to 1-83, Inclusive, Civil Nos. 1-85 to 1-90, Inclusive, ORDERS ON MOTIONS TO DISMISS

ALVA F. CARBUHN, et al,
Plaintiffs,
vs.
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al,
Defendants.
(and other cases as here numbered)

Civil Nos. 1-91 to 1-93, Inclusive,
Civil Nos. 1-95 to 1-101, Inclusive,

ORDERS ON MOTIONS TO REMAND

The above entitled actions came on for hearing before the court at Des Moines, Iowa, on the motions of the landowners to dismiss the within suits for condemnation of their lands, cases numbered 1-80 to 1-83, inclusive, and 1-85 to 1-90, inclusive, and to remand the actions to the District Court of Iowa, in and for Pottawattamie County, numbered 1-91 to 1-93, inclusive, and 1-95 to 1-101, inclusive.

A. B. Howland of the firm Gamble, Read and Howland of Des Moines, Ia., appeared for the condemnor Railroad Company, together with G. C. Wyland of Avoca, Ia.; Raymond A. Smith of the firm Peterson, Smith, Peterson, Beckman & Willson, of Council Bluffs, Ia., appeared for the landowners in cases numbered 1-80, 1-81, 1-82, 1-83, 1-86, 1-89, 1-91, 1-95, 1-96, 1-97, 1-100 and 1-101; John M. Peters of the firm of Hess & Peters, Council Bluffs, Ia., appeared for the landowners in cases numbered 1-85, 1-87, 1-92 and 1-99; and Daniel J. Gross of the firm Gross, Welch, Vinardi & Kauffman, Omaha, Nebr., appeared for the landowners in cases numbered 1-88, 1-90, 1-98 and 1-98.

Oral arguments were had and extensive briefs were submitted by the respective counsel and the court being advised finds that the above mentioned motions to dismiss should be sustained and the said motions to remand should be denied, as more fully set out in the court's

memorandum opinion and ruling on said motions, filed herein on July 19, 1952.

It is accordingly Ordered and Adjudged that said motions to dismiss in cases numbered 1-80 to 1-83, inclusive, and 1-85 to 1-90, inclusive, be and the same are hereby sustained, and said cases are dismissed.

It is further Ordered and Adjudged that said motions to remand in cases numbered 1-91 to 1-93, inclusive, and 1-95 to 1-101, inclusive, be and the same are hereby overruled. All parties except.

Signed at Des Moines, Iowa, this 23rd day of July, 1952.

s/ Wm. F. Riley,
United States District Judge

On July 23, 1952, there was entered by the Clerk of the Court a

JUDGMENT

by which the complaint of Chicago, Rock Island and Pacific Railroad Company was dismissed and judgment for the costs of the action was entered against it.

On August 18, 1952, Chicago, Rock Island and Pacific Railroad Company filed in the office of the clerk a

NOTICE OF APPEAL

directed to E. E. Posten, Clerk, and to Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, which recites that plaintiff appealed from the judgment entered on July 23, 1952, pursuant to the opinion and order dated July 19, 1952, to the United States Court of Appeals for the Eighth Circuit. With said notice of appeal there was filed a good and sufficient bond with corporate surety for costs upon appeal with penalty of Two Hundred and Fifty Dollars, which bond was approved by the clerk. Copies of the notice of appeal were mailed to

counsel for each defendant, and to Pottawattamie County, Iowa, which entered no appearance in this cause.

On August 22, 1952, there was filed in the office of the Clerk the following:

United States District Court, Southern District of Iowa, Western Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, et al, *Defendants.* (and other cases as here numbered)	Civil Nos. 1-80 to 1-83, Inclusive, Civil Nos. 1-85 to 1-90, Inclusive,
ALVA F. CARBUHN, et al, *Plaintiffs*, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, et al, *Defendants.* (and other cases as here numbered)	Civil Nos. 1-91 to 1-93, inclusive, Civil Nos. 1-95 to 1-101, inclusive, NOTICE OF CROSS-APPEAL AND APPEAL To be filed in 1-81

Notice is hereby given that Archie C. Stude, designated as defendant in Civil No. 1-81 and designated as plaintiff in Civil No. 1-101, hereby cross-appeals and appeals to the United States Court of Appeals for the Eighth Circuit from that portion of the consolidated Order en-

tered in the above entitled and numbered actions of July 23, 1952, overruling the Motion to Remand.

On September 25th, 1952, an order was entered by the Court extending the time for docketing the appeal in the office of the Clerk of the United States Court of Appeals for a period of seventy days from and after the filing of the notice of appeal.

On October 13, 1952, there was filed and entered in said cause the following

STIPULATION AND ORDER

It is hereby stipulated and agreed by and between the parties to the causes listed in the caption of this stipulation, by their respective counsel, as follows:

1. The causes referred to in the caption of this stipulation as numbers 1-80, etc., involve identical questions of law; the Complaints filed in each of said causes by C. R. I. & P. as plaintiff, and docketed in the said Court were and are identical in form, except as to the description of the particular lands sought to be condemned, the the description of lands owned by the particular landowner, the amounts awarded by the Commissioners appointed by the Sheriff of Pottawattamie County, Iowa, to assess and appraise the damages, and the amount which plaintiff C. R. I. & P. contends the assessment of damages should have been.

2. The causes referred to in the caption of this stipulation as Numbers 1-91, etc., involve identical questions of law and they involve the same parcels of land, the same landowners and the same commissioners awards as are involved in causes 1-80, etc. In each of said causes 1-91, etc., Notices of Appeal from the award of Commissianers appointed by the Sheriff of Pottawattamie County, Iowa, to assess and appraise the damages were served by C. R. I. & P. and said Notices of Appeal, together with the Sheriff's transcript were filed in the office of

the Clerk of the District Court of Iowa in and for Pottawattamie County at Avoca, on March 12, 1952. In each of said causes C. R. I. & P. filed a Petition for Removal, accompanied by a Bond in the office of the Clerk of the United States District Court for the Southern District of Iowa, Western Division, and notice of filing thereof was given to the landowner and to all other parties, and a copy of the notice of filing petition of removal with a copy of petition attached was filed in the office of the Clerk of the said State Court on March 12, 1952.

3. C. R. I. & P. has filed Notices of Appeal to the Court of Appeals for the Eighth Circuit in causes 1-80, etc., and, as appellant will docket its appeal in the United States Court of Appeals for the Eighth Circuit at St. Louis, Missouri, only in cause No. 1-81, and will include in the record in said cause the Complaint of C. R. I. & P. together with all exhibits therein referred to and filed therewith, including the transcript on Appeal as certified by G. R. Stuelke, Sheriff of Pottawattamie County, Iowa, Notice of Appraisal and Hearing before Commissioners, and the purported Notice of Appeal to the United States District Court for the Southern District of Iowa, Western Division, from assessment of damages, by C. R. I. & P.; the summons served on Archie C. Stude; the motion of the defendant Archie C. Stude, to dismiss said cause, and all rulings and orders of the Court, the Opinion of the Court in its entirety, and including the caption, and the Judgment in its entirety and including the caption entered in said cause and the Notice of Appeal.

4. The defendant landowners have served Notice of Cross-Appeals in each of the actions referred to in paragraph 1 herein, which will be included in the Record of the Appeal by Appellant, and said cross-appeals involve identical questions of law, and the said landowners have also filed appeals in Cause 1-91, et al. The defendant landowners as appellants in Causes No. 1-91, etc., will docket their appeal only in Cause No. 1-101. For the purpose of said Cross-Appeal in Cause No. 1-81 and said Appeal in Cause No. 1-101 there shall also be included

as part of the record referred to in Par. 3 hereof, the following: Notice of Appeal and Sheriff's Transcript on Appeal, to the District Court of Pottawattamie County, Iowa, by the C. R. I. & P. from the award of the Commissioners as to Archie C. Stude; Notice of filing of Petition of Removal in Cause No. 1-101; Petition of C. R. I. & P. for Removal in Cause No. 1-101; Motion to Remand filed by landowner Archie C. Stude in Cause No. 1-101; Motion for Rehearing filed by landowner Archie C. Stude in Cause No. 1-101; the Order of the Court overruling said motion for rehearing; and the Notices of Cross-Appeal and Appeal served and filed by the landowner Archie C. Stude in Causes Nos. 1-81 and 1-101.

5. The judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 1-81 as disclosed by the opinion of the Court and its mandate, or the judgment rendered by the Supreme Court of the United States and its mandate shall apply to each of the other causes docketed as Nos. 1-80, etc., with the same force and effect as if the opinion, judgment and mandate had been rendered and entered in each of said causes, and on request of any party on the rendition of the final judgment and issuance of mandate by the court finally determining the cause, the same judgment shall be entered by the Clerk of the United States District Court in each of said causes, and with the same force and effect as though each of said causes had been fully docketed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, or in the Supreme Court of the United States, and the judgment entered in said Cause No. 1-81 had been entered in each of the other causes.

6. The C. R. I. & P. may file its Motions to Dismiss the Cross-Appeal and Appeal filed by counsel for Archie C. Stude, in Causes No. 1-81 and 1-101 and it is agreed that the said motions shall, subject to the approval of the Court, be consolidated for briefing and for hearing, and, if the said Motions to Dismiss are overruled or denied, the parties agree that, subject to approval of the Court, the Appeal in Cause No. 1-101 and the Appeal and Cross-Appeal in Cause No. 1-81 shall be consolidated

for hearing and briefing. The judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 1-101, as disclosed by the opinion of the Court and its mandate, or the judgment rendered by the Supreme Court of the United States and its mandate shall apply to each of the other causes docketed as Nos. 1-91, etc., with the same force and effect as if the opinion, judgment and mandate had been rendered and entered in each of said causes and, on request of any party on the rendition of the final judgment and issuance of the mandate by the Court finally determining the cause, the same judgment shall be entered in the office of the Clerk of the United States District Court in each of said causes numbered as follows: 1-91, etc.

7. Briefs or Consolidated Briefs may be filed in the United States Court of Appeals for the Eighth Circuit or in the Supreme Court of the United States by counsel for any of the landowners who are parties to any of the causes set forth in the caption of this stipulation, and such counsel, subject to the order of the Court, may orally argue the cause.

8. One executed copy of this stipulation shall be submitted to the Judge of the United States District Court for the Southern District of Iowa, for approval, and request that the same be filed of record in the office of the Clerk of said Court, and it is agreed that the Court shall make an order approving said stipulation and directing that same be filed of record, and this stipulation shall be included in the record on appeal herein.

9. It is stipulated and agreed that the record in all appeals referred to herein shall be included in a single printed Record of which one-half of the costs of printing shall be advanced by the Chicago, Rock Island and Pacific Railroad Company and one-half by the landowners herein, pending final taxation of costs herein on appeal.

10. This stipulation shall not prejudice the right of any party hereto to make additions to the Record on Appeal, in the event of any error or omission therein.

October 9, 1952.

The above was signed by counsel of record for all parties in the causes therein referred to.

ORDER OF COURT

And now on this 13th day of October, 1952, the above and foregoing stipulation having been presented to the Court, and the Court having examined same, and being fully advised, it is

Ordered that the said stipulation be and is hereby approved. And it is further

Ordered that each and every provision and stipulation therein contained shall be and become the order of this Court with the same force and effect as if restated herein. And it is further

Ordered that the Clerk of this Court is directed to proceed in accordance with the provisions of the stipulation in the further conduct of the causes set forth in the caption of this stipulation.

Sgd. Wm. F. Riley,
Judge of the United States
District Court

ADDITIONAL RECORD FOR CROSS-APPEAL AND APPEAL

of Archie C. Stude and William Lumpkin.

On March 12, 1952, Chicago, Rock Island and Pacific Railroad Company filed in the office of the Clerk of the United States District Court for the Southern District of Iowa, Western Division, the following

PETITION FOR REMOVAL

Chicago, Rock Island and Pacific Railroad Company, defendant in the above entitled action, respectfully states and shows the court:

1. That it is a railroad corporation organized under the laws of the State of Delaware, qualified to and doing business in the State of Iowa, and owning and operating

lines of railroad within the State of Iowa, including a line extending through the County of Pottawattamie in said State.

2. Archie C. Stude, plaintiff in the above entitled cause, is an individual citizen of the State of Iowa, residing in Pottawattamie County in said State.

3. On or about the 11th day of March, 1952, there was docketed in the office of the Clerk of the District Court of Pottawattamie County, Iowa, an appeal from the award made by the Sheriff's Commissioners, appointed by the Sheriff of Pottawattamie County to assess and appraise the damages by reason of the taking and appropriation of certain described lands owned by Archie C. Stude, which lands were required for railroad purposes. In said action Archie C. Stude seeks to recover from Chicago, Rock Island and Pacific Railroad Company the sum of $23,883.60 on account of damage to the lands owned by said Archie C. Stude, by reason of the appropriation of approximately 24.47 acres for railroad purposes.

Attached to this petition for removal is a true copy of all process issued and served and all pleadings filed therein.

4. As grounds for removal of said action to this court, defendant, Chicago, Rock Island and Pacific Railroad Company, states that the said action in which Archie C. Stude is plaintiff and Chicago, Rock Island and Pacific Railroad Company is defendant now pending in the Pottawattamie County, Iowa, District Court at Council Bluffs is a civil action wherein the matter in controversy exceeds the sum of $3,000, exclusive of interest and costs, and the controversy is wholly between citizens of different states, to-wit: between a citizen of the State of Delaware and a citizen of the State of Iowa.

5. Chicago, Rock Island and Pacific Railroad Company tenders and files herewith a Bond with good and sufficient surety thereon, conditioned that it will pay all costs and disbursements incurred by reason of the removal

proceedings, should it be determined that said cause was not removable, or was improperly removed to this court.

6. A written notice of the filing of this petition and the aforesaid Bond will be given to all adverse parties as soon as may be, and a copy of this petition will be promptly filed with the Clerk of the District Court of Pottawattamie County, Iowa.

Wherefore, Chicago, Rock Island and Pacific Railroad Company prays:

1. That this cause shall be held removed to this court and that this court take exclusive jurisdiction thereof.

2. That this court shall take such further procedure required or permitted by law in order to properly present the issues in this cause for trial, and that this cause be docketed in this court, and that such further proceedings be had as justice may require.

The above Petition for Removal was verified by B. A. Webster, Jr., one of counsel for defendant.

Attached to the petition for removal was a

NOTICE OF APPEAL FROM ASSESSMENT OF DAMAGES BY CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

This notice was addressed to G. R. Stuelke, Sheriff of Pottawattamie County, Iowa; Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa. It bore an acceptance of service by said sheriff on March 11, 1952, and recited that the railroad company "has appealed and does hereby appeal from the award of damages made by Sheriff's Commissioners on or about February 12, 1952, in the amount of $23,883.60 for the taking and appropriation for railroad purposes of the lands described" in the transcript on appeal. It was signed by counsel for Chicago, Rock Island and Pacific Railroad Company, and recited that the appeal was taken to the District Court of Iowa in and for Pottawattamie County, at Avoca, and "will be docketed in the office of the Clerk of said Court

at Avoca, Iowa, on or before the 13th day of March, 1952."

Attached to the Petition for Removal was a

TRANSCRIPT ON APPEAL

which was identical with the transcript on appeal hereinbefore set forth in this Record at pages 5-9, except that the transcript refers to the notice of appeal to the District Court of Iowa in and for Pottawattamie County, at Avoca, and the certificate recites that said notice was served on the Sheriff of Pottawattamie County on March 11, 1952, and by him served on Archie C. Stude, William Lumpkin and Pottawattamie County on the 12th day of March, 1952.

Included in the transcript on appeal was a

NOTICE OF APPRAISAL AND HEARING BEFORE COMMISSIONERS

which was identical in form with the notice hereinbefore referred to in this record at page 9.

NOTICE OF FILING PETITION FOR REMOVAL

in the proper statutory form was served on Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, on March 12, 1952, and a copy of the Petition for Removal was attached thereto.

A Notice of the Filing of the Petition for Removal and a copy of the Petition for Removal were filed in the offices of the Clerk of the District Court of Iowa in and for Pottawattamie County, at Avoca, on March 12, 1952.

On March 24, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court the following

MOTION TO REMAND

Comes now the plaintiff, and moves the Court for an order to remand the above entitled action to the District Court of Iowa in and for Pottawattamie County, and in support thereof shows to the Court, the following:

1. That the United States District Court for the Southern District of Iowa, Western Division, is without jurisdiction in this case to either determine or pass upon any further question, and that this court is, under the laws of the United States, required to remand said cause to the District Court of Iowa in and for Pottawattamie County.

2. That the filing of said petition for removal is premature and this court is without jurisdiction to entertain said petition, for the reason that as shown by the said petition for removal no petition or other pleadings have been filed by plaintiffs in the State Court which could be subject matter of any removal to the Federal Court.

3. That said appeal action now pending in the District Court of Iowa, in and for Pottawattamie County, as shows by the petition for removal herein, is not removable to this court, for the reason that the Chicago, Rock Island and Pacific Railroad Company is not the defendant in said action within the meaning of Section 1441 of Title 28, U. S. C., so as to be entitled to remove said action.

On March 24, 1952, Archie C. Stude and William Lumpkin filed in the office of the Clerk of the United States District Court the following

PETTTION

Come now the plaintiffs herein, and state:

1. That they are actually defendants but are designated as plaintiffs according to the Statutes of Iowa.

2. Subject to the ruling on their motion to remand this action to the District Court of Iowa, and in compliance with the Statutes of Iowa, they state their cause of action as follows:

COUNT ONE.

1. Plaintiff Archie C. Stude is the owner of the north one-fourth of Section Twenty, Township Seventy-six north, Range Forty west in Pottawattamie County, Iowa. That he is interested in the operation of said farm as a joint venture with William Lumpkin.

2. That the defendant instituted proceedings in eminent domain before the Sheriff of Pottawattamie County, Iowa, to acquire ownership and possession of a right-of-way through said real estate, the exact description of which is set out in its removal petition. That the Sheriff's commission filed its report on February 12, 1952 and allowed this plaintiff the sum of $23,888.00 as damages, and the defendant has caused documents to be served upon this plaintiff indicating its intention to appeal said award to this Court and also to the District Court of Pottawattamie County, Iowa.

3. That the farm before described was for many years the home of Archie C. Stude and is now operated by his son-in-law, William Lumpkin; that it has an excellent and modern house, with other valuable improvements, replacement value of which would be more than $20,000.00. That the same is on an all-weather road and at all times has been adapted and suitable for use and operation as a combination stock and grain farm and has been so used and operated continuously for many years.

4. That the said right-of-way cuts through substantially the middle of said farm, in a northwesterly direction. That all of the buildings are on the north side of the right-of-way, which takes part of his feed lot. That his farm, with said right-of-way through it, is divided into two strips each of which are a mile long and only about 500 feet wide.

5. That for the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speeds of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully

compete with their competitors between Chicago and Denver, all of which was alleged to be impossible under present conditions, the defendant by condemnation proceedings under Iowa law and through the medium of a sheriff's jury, has taken the land and severed the farm as before stated.

6. That prior to the taking of said right-of-way, their farm was a one-man stock and grain farm located on all-weather road, had excellent school facilities and was a highly desirable farm on which to live, being equipped with all modern conveniences.

7. That by reason of the taking of said right-of-way, the plaintiffs have sustained damages in the sum of $32,000.00.

8. That the plaintiff Archie C. Stude and the plaintiff William Lumpkin are operating said farm as a joint venture, and are doing so both as to livestock operation and to grain raising operations.

9. That plaintiffs allege that they are not able at this time to enumerate all of the items that go to make up the damages to the farm as a whole sustained by said condemnation but allege that among such are included the following items which are elements of damage reducing the value of the farm.

a. The taking by the defendant of 24.47 acres of the best land.

b. Making the farm absolutely unsalable to a large number of potential buyers by reason of the construction through the farm of a high-speed line and destroying all value as a home.

c. Requiring the taking out of production of a strip not less than one rod wide on each side of the right-of-way, containing at least four acres and increasing the labor and expense of cutting weeds along additional fences along the right-of-way.

d. Destroying plaintiff's source of water supply and making it necessary for him to supply water for livestock and other farm purposes upon the parcel of land south of said right-of-way.

e. Making the farm usable only as two separate units, one of which has no buildings. The farm buildings now being located on the tract of land one mile long and 500 feet wide north of the right-of-way and the remainder of the farm of the same size and shape is severed from said buildings.

f. Limiting and making difficult the free movement about the farm of portable buildings and machinery.

g. Rendering the farm a very undesirable place to live by reason of the noise, vibration, soot, dirt and danger to children and also by increasing the hazards of fire. That the vibration will greatly impair the use of electrical instruments and the signals of the locomotive at all hours disturb the sleep of all occupants.

h. Place on the farm a constant and perpetual source of danger to everyone having occasion to go from the land on one side to the other and by limiting to careful and alert adults those who can be entrusted to drive livestock and haul portable buildings and machinery from one part to the other.

i. Increasing the danger and probability of importation to the farm of noxious weeds and plant and animal diseases.

j. Interference with drainage of the farm and making contouring impossible because of the shape of the parcels remaining, creating ditches by diverting surface water into culverts instead of sheet run-off thus encouraging erosion.

k. Greatly increasing the cost and labor of operation.

l. Necessitating the very dangerous crossing of the railroad line many times each day in normal operations.

m. Decreasing the desirability of the farm to good tenants and operators and making it difficult to obtain and retain such.

n. Decreasing the rental and sale value of the farm.

o. Destroying the suitability as use for a stock and grain farm.

p. By necessitating the travel between the land on each

side to be over one way or roadway, thus increasing erosion and rendering such way unusable for crop purposes.

8. Plaintiff Archie C. Stude requests a jury trial to assess his damages.

COUNT TWO.

1. Plaintiff William Lumpkin is the tenant and son-in-law of Archie C. Stude. That he is the operator as a joint venture with Archie C. Stude of the farm described as the north one-fourth of Section 20, Township 76 north, Range 40 west in Pottawattamie County, Iowa, containing 160 acres.

2. That the defendant instituted proceedings in eminent domain before the Sheriff of Pottawattamie County, to acquire ownership and possession of a right-of-way through said real estate, the exact description of which is set out in its removal petition. That the Sheriff's commission filed its report on February 12, 1952, and allowed this plaintiff the sum of $1000.00 as damages, and the defendant has caused documents to be served upon this plaintiff indicating its intention to appeal said award to this Court and also to the District Court of Pottawattamie County, Iowa.

3. That the plaintiff William Lumpkin, at the time of the condemnation proceedings, was a tenant upon the real estate described before. That he was operating said farm as a joint venture with the plaintiff Archie C. Stude.

4. That for the alleged purposes of shortening their line between Atlantic and Council Bluffs, Iowa, and of eliminating curves and grades, and to permit operation of trains at speed of ninety or more miles per hour with greater safety to the operators and riders, and in order to operate more economically and to successfully compete with their competitors between Chicago and Denver, all of which was alleged to be impossible under present conditions, the defendant by condemnation proceedings under Iowa law and through the medium of a sheriff's jury, has taken 24.47 acres of land for railway purposes through said farm.

5. That the plaintiff William Lumpkin lost the use of 24.47 acres of said farm from the time of said taking and he further sustains damages by reason of the taking of said right-of-way as follows:

a. Limiting and making difficult the free movement about the farm of portable buildings and machinery.

b. Rendering the farm a very undesirable place to live by reason of noise, vibration, soot, dirt and danger to children and also by increasing the hazards of fire. That the vibration will greatly impair the use of electrical instruments and the signals of the locomotive at all hours disturb the sleep of occupants.

c. Place on the farm a constant and perpetual source of danger to everyone having occasion to go from the land on one side to the other and by limiting to careful and alert adults those who can be entrusted to drive livestock and haul portable buildings and machinery from one part to the other.

d. Increasing the danger and probability of importation to the farm of noxious weeds and of plant and animal diseases.

e. Greatly increasing the cost and labor of operation.

f. Necessitating the very dangerous crossing of the railroad line many times each day in normal operations.

g. Destroying the suitability as use for a stock and grain farm.

h. By necessitating the travel between the land on each side to be over one way or roadway, thus increasing erosion and rendering such way unusable for crop purposes.

6. That by reason of the taking of said right-of-way, plaintiff William Lumpkin has been damaged in the sum of $2500.00.

7. Plaintiff William Lumpkin requests a jury trial to assess his damages.

Wherefore, plaintiffs pray that plaintiff Archie C. Stude be allowed the sum of $32,000.00 by reason of his damage as set out in Count One; that plaintiff William Lumpkin be allowed damages in the sum of $2500.00 by reason of

his damage as set out in Count Two. Plaintiffs further pray that each be allowed interest on the amount awarded at 5% from February 16, 1952, and costs of this action including attorneys' fees for their attorneys.

Thereafter an order was entered by the Court assigning the Motion to Remand for hearing at Des Moines, Iowa, at the same time fixed for the hearing on the Motion to Dismiss as set forth herein at page 17 of this Record.

Thereafter on July 19, 1952, the Court filed the Memorandum Opinion and Order hereinbefore set forth at pages 18-37 of this Record.

On July 23, 1952, the court filed an order overruling the Motion to Remand as hereinbefore set forth at pages 37-39 of this Record.

On July 23, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court the following

MOTION FOR REHEARING

Plaintiff herein moves the court for an order granting leave to re-argue the motion to remand in the above entitled action, for the following reason:

1. On page 11 in Division II of the Memorandum Opinion filed by the court herein on July 19, 1952, the court states that "the authority of the Boynton case is fully recognized and accepted." On page 12 thereof, the court in referring to the facts in the instant cases states "Therefore, the land is 'lost' to the owner and the situation of the parties is completely changed from that which existed in the Boynton case." Plaintiff submits that the facts in the Boynton case were similar to those present herein and that the amount of the awards had been deposited in

the Boynton case before appeals were taken, which fact appears in the statement of facts in the opinion as follows:

> "On the same day the railroad company paid the sheriff that amount of money for the use of the owner."

and in the body of the opinion itself, as follows:

> "Even if, as in this case, it deposits the amount first assessed with the sheriff, the latter is not to pay it over until the determination of the appeal. § 2010. We see no reason to suppose that the deposit impairs the railroad's right to withdraw, although the supreme court of Iowa says ubi supra, that, by payment and entry, the railroad appropriates the land. See § 2013."

Plaintiff further submits that under the finding of the court herein the Boynton case is controlling and the court is bound by the decision in the Boynton case. Plaintiff further submits that leave should be granted to re-argue said motion to point out the similarity of the factual situations because plaintiff believes that such would have a controlling effect herein.

Wherefore plaintiff prays that leave of court be granted plaintiff to re-argue the motion to remand in the above entitled action.

By order of court the Motion for Rehearing was orally argued on August 19, 1952, and on September 17, 1952, the court entered the following

ORDER OVERRULING MOTION FOR REHEARING

The above entitled causes came on for hearing before the court at Council Bluffs, Ia., on August 19, 1952, upon the motions of the several named plaintiffs herein for a rehearing of the ruling of the court made in its opinion of July 19, 1952, and its order thereon of July 23, 1952, denying their motions to remand the said actions to the District Court of Iowa in and for Pottawattamie County, from which they were removed by the defendant, Chicago, Rock Island & Pacific R. R. Company. Raymond A. Smith,

John Leroy Peterson, Phillip J. Willson of Council Bluffs, Ia., and G. C. Wyland of Avoca, Ia., appeared for the movants plaintiffs in cases numbered 1-91, 1-95, 1-96, 1-97, 1-100 and 1-101; John M. Peters of Council Bluffs, Ia., appeared for the movants in cases numbered 1-92 and 1-99; and Daniel J. Gross and Harold W. Kauffman of Omaha, Nebr., appeared for the movants in cases numbered 1-93 and 1-98. The said motions were argued both orally and by written briefs and upon consideration of the same, the court is satisfied that the ruling aforesaid should be affirmed.

It is therefore Ordered that the motions of the plaintiffs herein for a rehearing of the ruling made by the court in its opinion of July 19, 1952, and its order thereon of July 23, 1952, be and the same are hereby overruled and the said ruling and order of the court are hereby affirmed.

Signed at Des Moines, Ia., this 17th day of September, 1952.

s/ Wm. F. Riley,
United States District Judge.

On August 22, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court the following:

United States District Court, Southern District of Iowa, Western Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Plaintiff*, vs. WALTER KAY, ET AL., *Defendants*. (And other cases as here numbered)	Civil Nos. 1-80 to 1-83 inclusive, Civil Nos. 1-85 to 1-90 inclusive.

ALVA F. CARBUHN, ET AL., *Plaintiff*, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, ET AL., *Defendants.* (And other cases as here numbered)	Civil Nos. 1-91 to 1-93 inclusive, Civil Nos. 1-95 to 1-101, inclusive. NOTICE OF CROSS-APPEAL AND APPEAL To be filed in 1-101

Notice is hereby given that Archie C. Stude, designated as defendant in Civil No. 1-91 and designated as Plaintiff in Civil No. 1-101, hereby cross-appeals and appeals to the United States Court of Appeals for the Eighth Circuit from that portion of the consolidated Order entered in the above entitled and numbered actions of July 23, 1952, overruling the Motion to Remand.

On October 14, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court a

NOTICE OF CROSS-APPEAL AND APPEAL

identical in form with the notices set forth at pages 40, 41 and 57, 58, of this Record, except that said notice included the ruling of the court on the Motion for Rehearing entered on September 17, 1952.

On October 14, 1952, Archie C. Stude filed in the office of the Clerk of the United States District Court a

BOND FOR COSTS ON APPEAL

in the form and manner prescribed by law, which bond was approved by the clerk. Copies of the Notices of Appeal were mailed to counsel for Chicago, Rock Island and Pacific Railroad Company.

On September 25, 1952, an order was entered by the Court extending the time for docketing the appeals and cross-appeals in the office of the Clerk of the United

States Court of Appeals for a period of seventy days from and after the filing of the notice of appeal.

On October 13, 1952, there was filed and entered in said cause a

STIPULATION AND ORDER

as set forth at pages 41-45 of this Record.

DOCKET ENTRIES

No. 1-81 Civil Action

1952

Mar. 7 Filed Complaint.

Mar. 24 Filed Motion to Dismiss.

Mar. 24 Filed Answer and Counterclaim of defendants Stude and Lumpkin and Request for Jury Trial.

Mar. 26 Filed Certificate of Service.

June 14 Filed Affidavit of Philip J. Willson.

July 19 Filed Memorandum Opinion and Order. Riley, J., OJ1-498-516, incl. Notice to Counsel 7-19-52.

July 23 Filed Order sustaining Motion to Dismiss and Order of Dismissal. Riley, J.

July 24 Entered Order sustaining Motion to Dismiss and Order of Dismissal. Riley, J. OJ1-521-525, incl. Notice to Attys. 7-24-52.

Aug. 18 Filed Notice of Appeal of Chicago, Rock Island and Pacific Railroad Company. Copies mailed to Raymond A. Smith, John L. Peterson and Philip J. Willson, Co. Bluffs, Iowa, G. C. Wyland, Avoca, Iowa, Attys. for Defendants and to Auditor Pottawattamie County, Co. Bluffs, Iowa.

Aug. 22 Filed Notice of Cross-Appeal and Appeal. Copy mailed to R. L. Read, A. B. Howland and B. A. Webster, Jr., Des Moines, Iowa, Attys.

for C. R. I. & P. R. R. Co., and to Auditor of Pottawattamie County, Council Bluffs, Iowa.

Aug. 26 Filed Bond on Appeal—U. S. Guarantee Co. $250.00.

Sep. 25 Filed Stipulation for Extension of Time for Filing the Record on Appeal and Docketing the Appeals.

Sep. 25 Filed Order for Extension of Time for Filing Record on Appeal and Docketing Appeals. Riley, J. OJ1-573 to 576, incl. Notice to counsel 9/26/52.

Oct. 13 Filed Stipulation for correction of record.

Oct. 13 Filed Order for correction of Record, Riley, J., OJ1-592 to 596, incl. Notice to counsel 10/15/52.

Oct. 13 Filed Stipulation for Consolidation of Record.

Oct. 13 Filed Order for Consolidation of Record. Riley, J., OJ1-596 to 605, incl. Notice to counsel 10/15/52.

Oct. 13 Filed Bond for Costs on Appeal. ($250.00—United States Fidelity and Guaranty Company.)

DOCKET ENTRIES

No. 1-101 Civil Action

1952

Mar. 12 Filed Petition for Removal to the United States District Court for the Southern District of Iowa, Western Division.

Mar. 12 Filed Removal Bond—$1000 U. S. Guarantee Co.

Mar. 24 Filed Motion to Remand.

Mar. 24 Filed Petition with Request for Jury Trial.

Mar. 26 Filed Certificate of Service.

Mar. 27 Filed Appearance Attorneys for C. R. I. & P. R. R. Co.

Mar. 28 Filed Copy of Notice of Appeal with return of Sheriff of Pottawattamie County, Iowa.

Apr. 7 Filed Transcript on Appeal.

July 19 Filed Memorandum Opinion and Order. Riley, J., OJ1-498 to 516, incl. Notice to Counsel 7-19-52.

July 23 Filed Motion for Rehearing.

July 23 Filed Order overruling Motion to Remand. Riley, J.

July 25 Entered Order overruling Motion to Remand. Riley, J., OJ1-521 to 525, incl. Notice to Attys. 7-24-52.

Aug. 22 Filed Notice of Cross-Appeal and Appeal. Copy mailed to R. L. Read, A. B. Howland and B. A. Webster, Jr., Des Moines, Iowa, attys. for C. R. I. & P. R. R. Co., and to Auditor Pottawattamie County, Iowa, Council Bluffs, Iowa.

Sep. 17 Filed Order overruling Motion for Rehearing. Riley, J., Ent. OJ1-559 to 562, incl. Notice to counsel 9-17-52.

Sep. 25 Filed Stipulation for Extension of Time for Filing the Record on Appeal and Docketing the Appeals.

Sep. 25 Filed Order for Extension of Time for Filing Record on Appeal and Docketing Appeals. Riley, J., OJ1-573 to 576, incl. Notice to counsel 9-26-52.

Oct. 13 Filed Stipulation for correction of record.

Oct. 13 Filed Order for correction of record. Riley, J., OJ1-592 to 596, incl. Notice to counsel 10-15-52.

Oct. 13 Filed Stipulation for Consolidation of Record.

Oct. 13 Filed Order for Consolidation of Record. Riley, J., OJ1-596 to 605, incl. Notice to counsel 10-15-52.

Oct. 14 Filed Notice of Cross-Appeal and Appeal. Copy mailed to R. L. Read, A. B. Howland and

B. A. Webster, Jr., Des Moines, Iowa, Attys. for C. R. I. & P. R. R. Co.

Oct. 14 Filed Bond for Costs on Appeal. ($250.00—United States Fidelity and Guaranty Company.)

[fol. 63] And thereafter the following proceedings were had in said causes in the United States Court of Appeals for the Eighth Circuit, viz.:

(Appearance of Mr. R. L. Read, Mr. A. B. Howland, Mr. Oscar Johnson and Mr. Robert M. Stuart for Appellant in Cause No. 14,724.)

United States Court of Appeals
for the Eighth Circuit.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
No. 14,724. vs.
Archie C. Stude, et al.

The Clerk will enter my appearance as Counsel for the Appellant.

R. L. READ,

A. B. HOWLAND,
500 Bankers Trust Bldg.,
Des Moines, Iowa.

OSCAR JOHNSON,

ROBERT M. STUART,
Park Bldg.,
Council Bluffs, Iowa.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 23, 1952.

[fol. 64] (Appearance of Mr. B. A. Webster, Jr., as Counsel for Appellant in Cause No. 14,724.)

The Clerk will enter my appearance as Counsel for the Appellant.

B. A. WEBSTER, JR.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

(Appearance of Mr. Raymond A. Smith, Mr. John LeRoy Peterson and Mr. Philip J. Willson as Counsel for Appellees in Cause No. 14,724.)

The Clerk will enter my appearance as Counsel for the Appellees.

RAYMOND A. SMITH,
JOHN LeROY PETERSON,
PHILIP J. WILLSON.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 31, 1952.

(Appearance of Mr. John M. Peters as Counsel for Appellees in Cause No. 14,724.)

The Clerk will enter my appearance as Counsel for the Appellees.

JOHN M. PETERS.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

[fol. 65] (Appearance of Mr. Raymond A. Smith, Mr. John LeRoy Peterson and Mr. Philip J. Willson as Counsel for Appellant in Cause No. 14,725.)

United States Court of Appeals
for the Eighth Circuit.

Archie C. Stude, Appellant,
No. 14,725. vs.
Chicago, Rock Island and Pacific Railroad Company.

The Clerk will enter my appearance as Counsel for the Appellant.

RAYMOND A. SMITH,
JOHN LeROY PETERSON,
PHILJP J. WILLSON.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 31, 1952.

(Appearance of Mr. John M. Peters as Counsel for Appellant in Cause No. 14,725.)

The Clerk will enter my appearance as Counsel for the Appellant.

JOHN M. PETERS.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

[fol. 66] (Appearance of Counsel for Appellee in Cause No. 14,725.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. L. READ,

A. B. HOWLAND,

B. A. WEBSTER, JR.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

(Appearance of Mr. Raymond A. Smith, Mr. John LeRoy Peterson and Mr. Philip J. Willson as Counsel for Appellants in Cause No. 14,726.)

United States Court of Appeals
for the Eighth Circuit.

Archie C. Stude and William Lumpkin, Appellants,
No. 14,726. vs.
Chicago, Rock Island and Pacific Railroad Company.

The Clerk will enter my appearance as Counsel for the Appellants.

RAYMOND A. SMITH,

JOHN LeRoy PETERSON,

PHILIP J. WILLSON.

(Endorsed): Filed in U. S. Court of Appeals, Oct. 31, 1952.

[fol. 67] (Appearance of Mr. John M. Peters as Counsel for Appellants in Cause No. 14,726.)

The Clerk will enter my appearance as Counsel for the Appellants.

JOHN M. PETERS.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

(Appearance of Counsel for Appellee in Cause No. 14,726.)

The Clerk will enter my appearance as Counsel for the Appellee.

R. L. READ,

A. B. HOWLAND,

B. A. WEBSTER, JR.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 6, 1953.

[fol. 68] At the request of the attorneys for Chicago, Rock Island and Pacific Railroad Company there is included herein the Points To Be Argued, with citations of authorities, from the briefs of the parties filed in the three causes, as follows:

a. From the Brief for Appellant in No. 14,724.

Propositions Of Law Relied Upon And Citations.

I.

Upon the service of the notice of appeal to the District Court of the United States, the controversy became a civil action within the meaning of Sec. 1332, U. S. C. A., inasmuch as the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and the controversy is between citizens of different states.

Sec. 1332, U. S. C. A.;

Myers v. Chicago & Northwestern Ry. Co., 118 Iowa 312;

Mississippi & Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206;

Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. Ed. 462;

Union Pacific R. R. Co. Removal Cases, 115 U. S. 1, 29 L. Ed. 319;

Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629.

II.

The United States District Court has original jurisdiction over "civil actions," the prescribed jurisdictional requisites being present. After the administrative procedure in connection with condemnation proceedings under the laws [fol. 69] of the State of Iowa has been completed, and the controversy remaining involves only the amount of damages, the appeal to the courts permitted by the Iowa statute may be brought as an original suit in the Federal Court when the prescribed jurisdiction requisites exist.

Texas Pipe Line Co. v. Ware, 15 F. (2d) 171 (C. A. 8th);

Ellis v. Associated Industries Ins. Corp., 24 F.(2d) 809 (C. A. 5th);

Flowers v. Aetna Casualty & Surety Co., 154 F. (2d) 881 (C. A. 6th);

Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190, 38 L. Ed. 958;

United States v. 16,572 Acres of Land, et al., 49 F. Supp. 555.

III.

The Iowa statutes authorizing appeals from an assessment by the sheriff's commissioners (Sec. 472.18, Code of Iowa, 1950) to the "district court" does not purport to exclude a direct appeal to the United States District Court. To hold otherwise would result in denying the jurisdiction of the Federal Courts in civil actions where the jurisdictional requisites, as provided by Sec. 1332, U. S. C. A., exist, and to assume a power not possessed by the Iowa Legislature.

Blacker v. Thatcher, 145 Fed. (2) 255, cert. denied 89 L. Ed. 1409;

Guilfoil v. Hayes, 86 Fed. (2) 544, cert. denied 81 L. Ed. 876.

b. From the Brief of Appellees, No. 14,724, Cross-Appellant, No. 14,725, Appellants, No. 14,726.

Points To Be Argued And Citations.

Point I.

[fol. 70] Where the jurisdiction of a Federal Court is directly attached in a particular case, the presumption is against jurisdiction until the contrary affirmatively appears.

Young v. Main, 8 Cir., 72 F. 2d 640

Ward v. Morrow, 8 Cir., 15 F. 2d 660

McNutt v. McHenry Chevrolet Co., 298 U. S. 178, 80 L. Ed. 1135, 56 S. Ct. 780.

Norton v. Larney, 266 U. S. 511, 69 L. Ed. 413, 45 S. Ct. 145.

Point II.

A railroad desiring to condemn land pursuant to the substantive law of a state, including Iowa, may proceed either in the State Court or in the Federal Court. If it proceeds under the state law, it must follow the state procedure, and if it proceeds in Federal Court, it must follow Rule 71A of the Federal Rules of Civil Procedure.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 F. 370.

Mississippi, etc., River Room Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

Searl v. School District, 124 U. S., 197, 41 L. Ed. 415, 8 S. Ct. 460.

Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 49 L. Ed. 462, 25 S. Ct. 251.

Mason City & Fort Dodge Railway Company v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Kohl v. United States, 91 U. S. 367, 23 L. Ed. 449.

Code, Iowa, 1950, Chapter 471.

Code, Iowa, 1950, Secs. 471.6, 471.9, 471.10.

Code, Iowa, 1950, Chapter 472.

Code, Iowa, 1950, Secs. 472.3, 472.4, 472.8-472.13, 472.14, 472.17, 472.18, 472.21, 472.22, 472.25.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

[fol. 71] Point III.

There can be no direct appeal to the United States District Court from an award of commissioners appointed by a County Sheriff to appraise damages in a condemnation proceeding instituted under a state condemnation procedural statute and a purported appeal from such an award to the United States District Court is ineffective and confers no jurisdiction in the court.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 Fed. 370.

Williams Livestock Company v. Delaware L. & W. R. Co., D. C. Pa., 285 Fed. 795.

United States v. 16,572 acres of land, D. C., S. D. Texas, 49 Fed. Supp. 555.

California Prune & Apricot Growers Assn. v. Catz American Co., 9 Cir., 60 F. 2d 788.

United States v. 40,558 acres of land in Newcastle County, Delaware, 62 Fed. Supp. 98.

United States v. 18,236 acres of land in Franklin, Pennsylvania, 63 Fed. Supp. 665.

United States v. 1010.8 acres of land in Sussex County, Delaware, 77 Fed. Supp. 529.

United States v. 17,280 acres of land, more or less, situated in Saunders County, Nebraska, 47 Fed. Supp. 267.

United States v. 250 acres of land in Nueces County, Texas, 43 Fed. Supp. 937.

United States v. 266.25 acres of land in Charleston County, South Carolina, 43 Fed. Supp. 633.

United States v. Federal Land Bank of St. Paul, 8th Cir., 127 Fed. 2d 505.

Chicago, Rock Island & Pac. Railway Co. v. Kay, 107 F. Supp. 895.

[fol. 72] The Sloop Merchant D. C. New York, Abb. Adm. 1, 17 Fed. Cas. No. 9, 434.

Gibbons v. Ogden, 9 Wheat, 1, 6 L. Ed. 23.

Sibbach v. Wilson & Co., 212 U. S. 1, 85 L. Ed. 479, 61 S. Ct. 422.

Kellman v. Stoltz, D. C. Iowa, 1 F. R. D. 726.

Austin 1. Riley, 55 Fed. 833.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Notes of Advisory Committee on Rules, 28 U. S. C. A. following Rule 71A.

Point IV.

The Railroad failed to follow any of the procedural requirements of Rule 71A; therefore the District Court has no jurisdiction of the person or subject matter herein; and since the State Court first assumed jurisdiction of the res and subject matter herein, said State Court has exclusive jurisdiction.

United States v. Bank of New York & Trust Company, 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331.

Penn. General Casualty Company v. Commonwealth, 294 U. S. 189, 55 S. Ct. 386, 79 L. Ed. 850.

Franzen v. Chicago, M. & St. P. Ry. Co., 7 Cir., 278 Fed. 370.

Senior v. Pierce (C. C., S. D.-Ia., 1887) 31 Fed. 625.

Havner v. Hegnes (C. C. A. 8th, 1920), 269 Fed. 537.

American Automobile Insurance Company v. Freundt, 7 Cir., 103 F. 2d 613.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Point V.

The Railroad, having initiated state proceedings before the Sheriff and having proceeded with them to the point of [fol. 73] obtaining the land and proceeding with the construction, is bound by its election of forum and has waived any right to proceed in Federal Court.

Vanderwater v. City Natl. Bank of Kankakee, Ill., 28 F. Supp. 89.

Rock Island Motor Transit Co. v. Murphy Motor Freight Lines, Inc., 101 F. Supp. 978.

Yellow Cab Company v. Price, D. C., Ill., 50 F. Supp. 730.

Kane v. National Surety Corporation, D. C. Tex., 94 Fed. Supp. 605.

Hyatt v. Challiss, 55 Fed. 267.

Michigan Railroad Commission v. Detroit, etc., R. Co., 182 Mich. 234, 148 N. W. 385.

Franzen v. Chicago, Milwaukee & St. Paul Railway Co., 7 Cir., 278 Fed. 370.

21 C. J. S. Courts, Sec. 527, page 807.

Code, Iowa, 1950, Secs. 471.6, 471.9, 471.10.

Code, Iowa, 1950, Chap. 472.

Federal Rules of Civil Procedure, Rule 71A, 28 U. S. C. A.

Points To Be Argued And Citations.

Point I.

Where a case is properly before the United States Court of Appeals for review of an appealable order, any and all other orders determining the jurisdiction of the federal court may and will be reviewed.

Deckert v. Independence Shares Corp., 311 U. S. 282, 85 L. Ed. 199, 61 S. Ct. 229.

Mayflower Industries v. Thor Corp., et al., 3 Cir., 1950, 184 F. 2d 537.

Goldwyn Pictures Corp. v. Howells Sales Co., 2 Cir., 1923, 287 F. 100.

Johnson v. Butler Bros., 8 Cir., 1947, 162 F. 2d 87.

[fol. 74] Cray, McFawn & Co. v. Hegarty, Conroy & Co., 2 Cir., 1936, 85 F. 2d 516.

Schell v. Food Machinery Corp. 5 Cir., 1937, 87 F. 2d 385.

Smith v. Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 165, 17 S. Ct. 407, 410.

Willoughby v. Sinclair Oil & Gas Co., 10 Cir., 1951, 188 F. 2d 903.

Peters v. Standard Oil Co. of Tex., 5 Cir., 174 F. 2d 162.

State of Maryland v. Soper, 270 U. S. 9, 70 L. Ed. 449, 46 S. Ct. 185.

Point II.

A condemnor railroad appealing to a state district court from an award of commissioners, under a state procedural statute is not a "defendant" within the Federal Removal Statute, 28 U. S. C. A., Sec. 1441.

Mason City v. Fort Dodge Railroad Company v. Boynton, 1907, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321.

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868.

State of Minnesota v. Chicago M. St. P. & P. R. R. Co. (D. C. Minn. 4th Div. 1931), 50 F. 2d 430.

Rock Island Motor Transit Co. v. Murphy Motor Freight Lines (D. C. Minn., 1952), 101 F. Supp. 978.

Hagerla v. Mississippi River Power Co., D. C. Ia., 202 Fed. 771.

Kloeb v. Armour & Company, 311 U. S. 199, 85 L. Ed. 124, 61 S. Ct. 213.

Merchants Food Distributors v. Clinton Foods, 92 Fed. Supp. 941.

Breyman v. Pennsylvania, O. & D. R. Company, 6 Cir., 38 F. 2d 209.

Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. Okla.), 175 F. 456.

Odhner v. Northern Pac. Ry. Co. (C. C. N. Y.), 188 F. 507.

[fol. 75] Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. Tenn.), 201 F. 932.

Key v. West Kentucky Coal Co. (D. C. Ky.), 237 F. 258.

Cudney v. Midcontinent Airlines, Inc., 98 F. Supp. 403.

Code, Iowa, 1950, Secs. 472.14, 472.18, 472.20, 472.21.

28 U. S. C. A., Sec. 1441 (a).

c. From the Reply Brief of Appellant in No. 14,724, Appellee in No. 14,725 and Appellee in No. 14,726.

Points To Be Argued In Reply And Citations.

I.

(Refers to Points II and V of Appellee's Brief.)

A. U. S. District Courts have original jurisdiction only in "civil actions" where the matter in controversy exceed the sum or value of $3,000, exclusive of interest and costs and is between citizens of different states.

U. S. Code Ann., Tit. 28, Sec. 1332.

B. A condemnation proceeding in the nature of an inquest or preliminary appraisement of damages conducted by administrative officers of a state is not a civil action within the meaning of Sec. 1332, U. S. Code Ann.

Kaw Valley Drainage District v. Metropolitan Water Co., 196 Fed. 315 (C. A. 8th);

Des Moines Water Co. v. City of Des Moines, 206 Fed. 657 (C. A. 8th);

Mississippi and Rum River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206;

[fol. 76] Searl v. School District, 124 U. S. 197, 31 L. Ed. 415.

C. Rule 71A, Federal Rules of Civil Procedure, is a rule regulating procedure in cases properly within the jurisdiction of district courts. The rule neither grants jurisdiction nor enlarges the pre-existing jurisdiction of the district courts.

II.

(Refers to Point III of Appellee's Brief.)

The procedure followed by appellant was in substantial compliance with the requirements of Rule 71A, and the U. S. District Court had jurisdiction both over the parties and the subject matter of the action.

A. Rule 71A expressly requires that state law be followed when the law of the state requires trial of the issue of compensation by commission.

III.

A state may not by its laws create rights, provide for their acquisition and determination in a judicial proceeding and restrict the right of non-residents to resort to federal tribunals. The provisions of Section 472.18, Iowa Code 1950, do not deprive appellant here of its federal right to resort to the courts of the United States for the determination of the amount of compensation to which the landowners may be entitled for the taking of their lands.

Point To Be Argued And Citations.

I.

A condemnor of lands for railroad purposes is both a [fol. 77] nominal and actual defendant upon an appeal to the Iowa District Court from the award of damages made by Sheriff's commissioners.

Sec. 472.21, Iowa Code 1950;

Mason City & Ft. Dodge R. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629.

Kirby v. Chicago & N. W. Ry. Co., 106 Fed. 551;

Hagerla v. Mississippi River Power Co., 202 Fed. 771;

Myers v. Chicago & N. W. Ry. Co., 118 Iowa 312, 91 N. W. 1076.

[fol. 78] (Order of Submission in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
for the Eighth Circuit.

September Term, 1952.

Friday, March 6, 1953.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
No. 14,724. vs.
Archie C. Stude, et al.

Appeal from the United States District Court
for the Southern District of Iowa.

Archie C. Stude, Cross-Appellant,
No. 14,725. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court
for the Southern District of Iowa.

and

Archie C. Stude, et al., Appellants,
No. 14,726. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court
for the Southern District of Iowa.

These causes Nos. 14,724, 14,725 and 14,726, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. A. B. Howland for the Chicago, Rock Island and Pacific Railroad Company, continued by Mr. Raymond A. Smith and Mr. Harold W. Kauffman for Archie C. Stude, et al., and concluded by Mr. A. B. Howland for the Chicago, Rock Island and Pacific Railroad Company.

Thereupon, these causes were submitted to the Court on the printed record and briefs of counsel filed herein.

[fol. 79] (Opinion in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
For The Eighth Circuit.

No. 14,724.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
vs.
Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

No. 14,725.

Archie C. Stude,
Cross-Appellant,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Cross-Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

No. 14,726.

Archie C. Stude and William Lumpkin,
Appellants,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[April 30, 1953.]

A. B. Howland (R. L. Read and B. A. Webster, Jr., were with him on the brief) for Chicago, Rock Island and Pacific Railroad Company.

Raymond A. Smith and Harold W. Kauffman (Philip J. Willson, John M. Peters, G. C. Wyland, Daniel J. Gross, and Dorothy O'D Martin were with them on the brief) for Archie C. Stude, et al.

Before GARDNER, Chief Judge, and THOMAS and COLLET, Circuit Judges.

COLLET, Circuit Judge.

This action involves the right of the Rock Island Railroad Company to have the issue of damages for the taking of private property by eminent domain under state law determined in the federal courts.

The actions, ten in number,[1] were initiated by the Rock Island by filing with the sheriff of Pottawattamie County, Iowa, a written application conforming to the Iowa Code of practice in eminent domain proceedings by railroad companies. Authority had theretofore been obtained from the Interstate Commerce Commission and the state authorities of Iowa to relocate a short section of the Rock Island's line in the interest of better alignment and reduction of mileage. The Iowa Code fixes the following procedure. An application is filed with the sheriff of the county, requesting that he appoint a commission to assess the damages. The commissioners make their report fixing the damages and the condemning party takes possession of the property upon paying the amount of the commissioners' award to the sheriff for the use of the property owner. In this case the

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[1]Ten tracts were involved. Separate proceedings were filed as to each. By stipulation all parties agreed that an appeal would be taken in the proceeding relating to one only and the remainder should abide the result in this one.

amount of the commissioners' awards was paid, the Rock Island took possession, and the sheriff holds the funds subject to orders. The assessment made by the commissioners becomes final if not appealed from within a period fixed by the statute. Either party may appeal. An appeal is taken by giving notice to the sheriff and the interested parties, the appeal is lodged in the district court of the state for the appropriate county in which the land is situated, and docketed in that court. The Iowa Code provides that appeals shall be docketed in the name of the owner of the land, or the name of such other appealing party interested in the land, as plaintiff, and in the name of the applicant for condemnation as defendant, and thereafter tried "as in an action by ordinary proceedings." After the appeal is docketed the Code provides that:

"472.22. Pleadings on appeal. A written petition shall be filed by the plaintiff on or before the first day of the term to which appeal is taken, stating specifically the items of damage and the amount thereof. The defendant shall file a written answer to plaintiff's petition, or such other pleadings as may be proper."

The issue of damages is then tried de novo by jury on demand of either party.

The foregoing statutory procedure was strictly followed by the Rock Island up to the point of lodging the appeals with the state district court. The Rock Island paid the amount of the commissioners' award to the sheriff, took possession of the condemned property and began the construction of the railroad on it. But instead of filing appeals only with the state district court it lodged one appeal from each award of the sheriff's commission with that court and another, duplicate in effect, with the United States District Court. The appeals docketed in the state district court were docketed in the names of the landowners as plaintiffs and the Rock Island as defendant as the statute provided. After the appeals were docketed in the state district court,

the property owners filed their "petitions" as plaintiffs, as provided for under the state Code, setting up their claims for damages for the taking of their property. Those claims were substantially in excess of the amount awarded by the commissioners. Those appeals were removed to the United States District Court by the Rock Island. Thus the Rock Island sought to insure the trial of the issue of damages in the United States courts by taking alternate procedural methods of obtaining that result, an expedient not heretofore unknown to federal jurisprudence in other types of actions. The requisite diversity of citizenship and amount involved existed in each case. Motions to remand were filed by the property owners in each of the cases removed from the state district court, on the ground that the Rock Island, being the plaintiff, could not remove. Motions to dismiss the appeals which had been taken by the Rock Island direct from the sheriff's commissioners' awards to the United States District Court were filed by the property owners on the ground that such appeals were unauthorized by either the state Code or by the Federal Rules of Civil Procedure applicable to proceedings in eminent domain. The trial court sustained the motions to dismiss the appeals to the United States District Court taken direct from the award of the commissioners on the ground that at that stage of the condemnation proceedings, under the state Code those proceedings were not "civil actions brought in a state court" within the meaning of the removal statutes, but were in the nature of inquests to ascertain the value of the land, not then pending in any court. The trial court denied the motions to remand on the ground that the Rock Island was, at the time of removal, the defendant within the meaning of the removal statutes. *Chicago, Rock Island & P. R. Co.* v. *Kay, et al*, 107 F. Supp. 895. The Rock Island appealed from the judgment of dismissal. The property owners cross-appealed from the order denying the motion to remand. The appeals were submitted as one case. Under

these circumstances the propriety of the order denying the motion to remand will be reviewed,[2] although such an order, standing alone, is not an appealable order.[3]

The Rock Island contends that it had the right of appeal direct from the commissioners' award filed with the sheriff to the United States District Court before Rule 71A of the Federal Rules of Civil Procedure became effective and that since the effective date of Rule 71A, and particularly Rule 71A (k), the specific procedure for the exercise of that right of appeal is fixed by that rule.[4]

There can be no doubt that when the requisite diversity of citizenship and the amount involved exist, proceedings for the acquisition of private property by eminent domain under state law may be removed from a state court to a federal court. But that right of removal[5] exists only when the proceedings have ripened into a civil action in a state court. In *Boom Co. v. Patterson*, 98 U.S. 403, 406, 25 L. Ed. 206, the Supreme Court said:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in

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[2] *Deckert v. Independence Corp.*, 311 U.S. 282; *Schell v. Food Machinery Corp.*, 87 F.2d 986; *Johnson v. Butler Bros.*, 102 F.2d 87; *Cray, McFeeters & Co. v. Hegarty, Conroy & Co.*, 95 F.2d 515; *Mayflower Industries v. Thor Corp.*, 104 F.2d 807. *Dillinger v. Chicago, R. & Q. R. Co.*, 19 F.2d 198, decided by this court to the contrary, was in effect overruled in *Johnson v. Butler Bros.*, 102 F.2d 87, and note should be taken that the former should no longer be followed. *McCabe v. Guaranty Trust Co.*, 343 F. 645, also to the contrary, decided by the Court of Appeals for the Second Circuit, was later overruled by that court in *Cray, McFeeters & Co. v. Hegarty, Conroy & Co.*, 95 F.2d 515.

[3] *Reed v. Lehman*, 91 F.2d 919; *Miller v. Pyrites Co.*, 71 F.2d 894.

[4] "(k) Condemnation Under a State's Power of Eminent Domain. The practice as herein prescribed governs in actions involving the exercise of the power of eminent domain under the law of a state, provided that if the state law makes provision for trial of any issue by jury, or for trial of the issue of compensation by jury or commission or both, that provision shall be followed." Fed. Rules Civ. Proc. Rule 71A, 28 U.S.C.A.

[5] 28 U.S.C.A., Sec. 1441 (a) "* * * any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States * * *."

the ordinary sense of those terms. But when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the District Court. *Turner* v. *Halloran*, 11 Minn. 253. The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the State to the Federal court, if the controversy were between the company and a citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

That the condemnation proceedings under the Iowa Code did not become suits or civil actions in the state courts of Iowa until the appeals were lodged and docketed in the state district court is clear from the following expression of the Iowa Supreme Court in *Myers* v. *Chicago & N. W. Ry. Co.*, 118 Iowa 312, 315-316, 91 N.W. 1076, 1078:

"From these statutes it plainly appears that the proceeding before the commissioners appointed by the sheriff to appraise the land is not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had, and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. Thus far then the proceeding is in no respect a suit.

* * * * * * *

"Unless in court, or before those exercising judicial functions, the proceeding cannot be regarded as a suit. (Citing cases) That the proceeding to condemn land is not a suit, within the language of the removal acts of congress, and is such after the appeal to the district court,

seems to be conclusively settled against the appellees in *Boone Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 207, and *Railroad Co. v. Myers*, 115 U.S. 1, 5 S. Ct. 1113, 29 L. Ed. 312. See, also, *Scarl v. School Dist.*, 124 U.S. 197, 8 S. Ct. 460, 31 L. Ed. 415."

But the question of whether the proceedings were removable at the time of the attempted appeal to the federal court from the commissioners' award is beside the point in determining the existence of a *right of appeal* of those proceedings to the federal court. The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioners' award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71A confers none. No such right exists.

It is apparent from what has already been said that the proceedings were removable from the state district court to the United States District Court at the time the petitions for removal were filed. But the question is whether the Rock Island could remove them. Under the present removal statute, 28 U.S.C.A. Sec. 1441(a) heretofore quoted in a footnote, only a defendant has that right. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868.

In *Mason City & Fort Dodge R. Co. v. Boynton*, 204 U.S. 570, 51 L. Ed. 629, 27 S. Ct. 321, the Supreme Court held that a railroad company condemning land under the Iowa Code was the plaintiff and the landowner the "defendant" for the purpose of removal. In that case the Supreme Court noted, but disregarded, the Iowa Supreme Court's construction of the laws of Iowa governing condemnation. The Iowa court had construed its statutory law in such proceedings as placing the railroad condemnor in the position of an actual as well as nominal defendant after the proceedings had progressed to the point of the ascertainment of the amount of damages. *Myers v. Chicago & N. W. Ry.*

Co., 118 Iowa 312, 91 N.W. 1076. That is the stage at which the present proceedings stand.* The Supreme Court, in laying aside the argument that the state decision, holding that the railroad was the actual defendant and had the right to remove, was controlling, said:

"But this court must construe the Act of Congress regarding removal. And it is obvious that the word defendant as there used is directed toward more important matters than the burden of proof or the right to open and close."

The court then considered the Iowa statute as a whole and reached the conclusion that, properly construed and evaluated, the condemnor under that statute is the plaintiff for purposes of removal, despite the holding of the state court to the contrary.

For present purposes we may not pay heed to the opinion, frequently expressed with considerable logic by courts and writers other than the Iowa Supreme Court, that in eminent domain proceedings which have reached this stage the landowner becomes the plaintiff for all practical purposes. For we are of course to follow the Supreme Court in *Mason City* v. *Boynton* if subsequent decisions of the Supreme Court have not directed a different course. We come to the effect of *Erie* v. *Tompkins*, 304 U.S. 64, upon the present situation.

Mason City v. *Boynton* was decided long before *Erie* v. *Tompkins*. The latter decision was, at the time of its announcement, and thereafter, recognized by the bench and the bar as changing the previous concept of the controlling

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*The trial court was of the opinion that the present case was distinguishable from *Mason City* v. *Boynton* because here the Rock Island had irrevocably taken the property condemned whereas in *Mason City* v. *Boynton* some emphasis was given to the fact that the railroad had not done so but was free to elect to abandon the condemnation proceedings if the final assessment of damages was greater than it chose to pay. While there is that clear factual difference between this case and *Mason City* v. *Boynton*, we are not convinced that the result reached in that case would have been different if, as here, there had been an irrevocable taking.

deference to be given rules of decision of state courts on questions of substantive law in diversity cases. No longer is there doubt as to the duty of federal courts to follow the law of the state on such questions. In *Mason City* v. *Boynton* the importance of the present question is recognized by the language of the above-quoted excerpt from the opinion. The determination of the question now before us determines, among other rights, the right of a party to the benefits of the Removal Act, a right universally recognized as both valuable and important. We would be constrained to apply the rule of *Erie* v. *Tompkins* and treat the right of a party to be characterized as a defendant for the purpose of having the benefit of the right of removal as a substantive matter to be determined by the state on questions arising locally were it not for what appears to us to be the controlling effect of the *Shamrock* case.[1] For, indeed, it would seem that the Iowa Supreme Court would be best able to evaluate the effect of the Iowa Code in this regard, and, having done so, that the federal courts should bow to the construction placed upon a local statute by the highest court of the state. The long-established rule in that regard was reiterated only last month in *Albertson* v. *Millard*, ... U.S. ...., wherein the court said:

"Interpretation of state legislation is primarily the function of state authorities, judicial and administrative. The construction given to a state statute by the state courts is binding upon federal courts."

Also cf. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359 (dissenting opinion). But in the light of *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, we may not do so. *Erie* v. *Tompkins* was decided April 25, 1938, as most everyone now knows. The *Shamrock-Sheets* case was decided April 28, 1941. While from the printed

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[1] See also *Chicago, M. & St. P. Ry. Co.* v. *Drainage Dist. No. 8*, 253 F. 491 (D.C. Iowa).

summarization of the argument for petitioner, found preceding the opinion, it does not appear that the rule of *Erie* v. *Tompkins* was specifically interposed in the *Shamrock* case, yet the rule of *Erie* v. *Tompkins* could not well have been overlooked. We may confidently assume that if the rule of *Erie* v. *Tompkins* should have been applied, it would have been applied in the *Shamrock* case. But instead of applying that rule we find that the Supreme Court, referring to *Mason City & Fort Dodge* v. *Boynton, supra,* said in the *Shamrock* case:

"Petitioner argues that although nominally a plaintiff in the state court it was in point of substance a defendant to the cause of action asserted in the counterclaim upon which, under Texas procedure, judgment could go against the plaintiff in the full amount demanded. (Citing cases) *But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. Dodge R. Co.* v. *Boynton,* 204 U.S. 570. The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts." (Italics supplied)

And prior to *Erie* v. *Tompkins* the Supreme Court announced a similar doctrine in *Road District* v. *St. Louis S. W. Ry. Co.,* 257 U.S. 547, 557:

"But it is said that the State Supreme Court [of Arkansas] has held otherwise and that such a decision is binding on us. The question of removal under the federal statute is one for the consideration of the federal court. It is not concluded by the view of a state court as to what is a suit within the statute. *Upshur County* v. *Rich,* 135 U.S.

467, 477; *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U.S. 570; *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U.S. 239. While the decision of the state court as to the nature of a proceeding under state statutes sought to be removed is, of course, very persuasive, it is not controlling because involved in the application of a federal statute and the exercise of a federal constitutional right. The issue as to removal is akin to the question, which sometimes arises in enforcing the inhibition against state laws impairing the obligation of a contract, whether there is a contract under state law. This court decides that for itself. *University* v. *People*, 99 U.S. 309; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Delmas* v. *Insurance Co.*, 14 Wall. 661."

Hence both before and after *Erie* v. *Tompkins* the rule followed in construing and applying the removal statute has remained the same.

In our judgment we are bound by the *Mason City* case and the *Shamrock* case and must hold that the Rock Island Railroad was not a defendant within the meaning of the removal statute and could not, therefore, remove the civil actions from the district court of Iowa to the federal court. The judgment of the trial court dismissing the direct appeal from the commissioners' award to the United States District Court is affirmed.

The order of the trial court denying the motion to remand the proceedings removed from the district court of Iowa to the United States District Court is reversed with directions to grant the motion and remand the cause.

The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject.

[fol. 91] (Judgment in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
For The Eighth Circuit.

September Term, 1952.

Chicago, Rock Island and Pacific Railroad Company, Appellant,
No. 14,724. vs.
Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa.

Appeal from the United States District Court for the Southern District of Iowa.

Archie C. Stude, Cross-Appellant,
No. 14,725. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court for the Southern District of Iowa.

and

Archie C. Stude and William Lumpkin, Appellants,
No. 14,726. vs.
Chicago, Rock Island and Pacific Railroad Company.

Appeal from the United States District Court for the Southern District of Iowa.

These causes came on to be heard on the joint record of proceedings in the United States District Court for the Southern District of Iowa printed pursuant to stipulation of parties, and were argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said Dis-[fol. 92] trict Court dismissing the direct appeal of the Chicago, Rock Island and Pacific Railroad Company to the United States District Court from the Commissioners' award be, and hereby is, affirmed.

It is further Ordered and Adjudged by this Court that the Order of the said trial court denying the motion of the

landowners to remand the proceedings removed from the District Court of Iowa in and for Pottawattamie County to the United States District Court is by this Court hereby reversed with costs and with directions to grant the motion and remand the cause.

And it is further Ordered and Adjudged by this Court that Archie C. Stude, Cross-appellant in cause No. 14,725, have and recover from the Chicago, Rock Island and Pacific Railroad Company the sum of Twenty-five and no/100 ($25.00) Dollars, Clerk's general costs in said cause in this Court, and that Archie C. Stude and William Lumpkin, appellants in Cause No. 14,726, have and recover from the Chicago, Rock Island and Pacific Railroad Company the sum of Twenty-five and no/100 ($25.00) Dollars, Clerk's general costs in said cause in this Court, and one-half (½) of the taxable cost of printing the record on the three appeals to this Court, amounting to One Hundred Thirty-three and 10/100 ($133.10) Dollars, according to affidavit of counsel for the landowners and letters of counsel for the respective parties, and that executions issue for the respective amounts.

June 17, 1953.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Appellant, vs. ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA, Appellees.	No. 14,724.
ARCHIE C. STUDE, Cross-Appellant, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Cross-Appellee.	No. 14,725.
ARCHIE C. STUDE and WILLIAM LUMPKIN, Appellants, vs. CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Appellee.	No. 14,726.

Appeal and Cross-Appeal From United States District Court for the Southern District of Iowa, Wm. F. Riley, Judge.

PETITION FOR REHEARING

On Behalf of Chicago, Rock Island and Pacific Railroad Company and

BRIEF IN SUPPORT THEREOF.

THE CASE.

The court will recall that these appeals present the following legal questions:

1. May a non-resident condemnor of real estate under state law, commence an action as plaintiff, in the United States District Court, for a judicial determination of the

amount which it must pay a landowner for land appropriated, when applicable state statutes provide only for an appeal to a state court, and make the case triable there by ordinary proceedings before a court and jury?

2. May a non-resident condemnor of real estate who follows the administrative procedure prescribed by state law of eminent domain, and then appeals from the award of such administrative tribunal to a state court, remove the action to the Federal District Court for trial?

The District Court for Southern Iowa ruled that the non-resident condemnor might have instituted its eminent domain proceeding initially in the United States District Court, and, having elected to proceed under the applicable state law in an administrative proceeding before the County Sheriff, it could not thereafter institute a civil action as plaintiff in a Federal Court; also since diversity of citizenship and requisite jurisdictional amount existed, the condemnor might follow applicable state law, appeal to the state tribunal as provided by state statutes, and remove the case to the appropriate District Court.

THE OPINION OF THIS COURT.

By its opinion filed April 30, 1953, this court rejected the reasoning by which the District Court had arrived at the conclusion that condemnor's complaint as a plaintiff should be dismissed. This court held that:

> "The question of whether the Rock Island (condemnor and petitioner herein) could have initiated the proceedings in the United States District Court is not before us * * *. We express no opinion on that subject."

This court then disposed of the appeal in No. 14,724 by saying:

"The short and simple answer to the Rock Island's contention that it had the right of direct appeal from the commissioner's award to the federal court is that there was no right of appeal from the commissioners' award to the federal court provided for in the state Code and Rule 71A confers none. No such right exists."

With respect to question 2 set forth above, the opinion holds that under **Mason City & Fort Dodge R. Co. v. Boynton**, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, and **Shamrock Oil & Gas Corp. v. Sheets**, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, the Rock Island (condemnor) was not a defendant within the meaning of the removal statute, 28 U. S. C. A., Sec. 1441, and could not, therefore, remove the action to the District Court.

Under the decision of this court, although state law provides for a judicial action triable by ordinary proceedings, a non-resident condemnor is denied the privilege of instituting that civil action in an appropriate United States District Court because state laws prescribe only an appeal to a state court; thus, a non-resident condemnor may not, because of the procedural provisions prescribed by state laws, be a plaintiff in the United States District Court. On the other hand, a non-resident condemnor of real estate may not appeal to the state tribunal prescribed by statute and remove the action to the Federal court because it is not a defendant within the meaning of the removal statues.

Thus, it is plain that the provisions of 28 U. S. C. A., Sec. 1332 and Sec. 1441 have been so construed as to completely deny to a non-resident condemnor of real estate the right to resort to the United States District Court solely because of procedural provisions of state statutes.

POINTS TO BE ARGUED.

I.

The District Courts of the United States have jurisdiction in "civil actions" involving eminent domain proceedings, instituted under applicable state laws, when requisite diversity of citizenship and jurisdictional amount exist. Rule 71A clearly recognizes this jurisdiction. The opinion of this court erroneously makes the right of petitioner to resort to the United States Courts dependent upon state law.

28 U. S. C. A., Sec. 1332.

II.

Purely procedural state laws may neither deny, restrict nor enlarge the jurisdiction of the courts of the United States. The jurisdiction of the United States Courts and the right to resort thereto are created solely by Federal statutes. The decision of this court denies to appellant in No. 14,724 a right granted by 28 U. S. C. A., Sec. 1332.

Davis v. Gray, 16 Wall. 203, 21 L. Ed. 447;

Landon v. Public Utilities Commission, 234 Fed. 152, 164;

Burford et al. v. Sun Oil Co. et al., 319 U. S. 315, 87 L. Ed. 1424;

In re Mississippi River Power Co., 241 Fed. 194.

III.

The conclusion reached by this court, denying to a nonresident condemnor the right to resort to the United States Courts for determination of its liability to pay for lands appropriated, directly conflicts with the decisions of the

Supreme Court of the United States, the prior decisions of this court and the decisions of courts of appeal in other circuits of the United States.

IV.

The opinion of this court erroneously construes the opinions of the United States Supreme Court in **Mason City & Fort Dodge R. Co. v. Boynton** and **Shamrock Oil & Gas Corp. v. Sheets.**

ARGUMENT.

POINTS I, II AND III.

The opinion of this court first summarizes the Iowa statutes on the subject of eminent domain; the court then states that the appellant railroad company (Rock Island) contends that it had the right of appeal direct from the commissioners' award filed with the sheriff to the United States District Court. The court then says that no such right of appeal exists. The balance of the opinion is devoted to the question of removability of the appeal taken to the state court, and with the application of the rule of **Erie Railroad Co. v. Tompkins** to the situation here presented.

We have signally failed to make our position in this case clear to the court. We do not urge that the Iowa statutes give to the Rock Island a right of appeal direct from the award made by the sheriff's commission to the United States District Court. What we contend is simply that the statutes of Iowa have created certain substantive rights, which may be acquired under the state power of eminent domain, and provided for the determination of any controversy with respect to those rights by a civil action triable by ordinary proceedings. Of course, the administrative steps prescribed by state law to acquire rights under the power of eminent domain cannot be exercised by a proceeding in the United States District Court, but when these rights have been acquired, a civil action to determine the amount which a condemnor must pay may be brought either in the state court, or in a United States District Court, if diversity of citizenship and the requisite jurisdictional amount are present. In the early case of **Davis v. Gray**, 10 Wall. 203, 21 L. Ed. 447, the Supreme Court of the United States laid down the rule that:

"A party by going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals."

The problem presented by the record here is a relatively simple one, and the answer would be perfectly plain and obvious were it not for the fact that the Iowa statute prescribes an "appeal" from the sheriff's commission to the district court. For example, had the Iowa statute provided for the appointment of commissioners and the making of an award and then said that either landowner or condemnor, if dissatisfied with the award, might bring an action in a court of competent jurisdiction to have the amount of compensation to which the landowner was entitled determined by ordinary proceedings, no question would arise. A non-resident condemnor would then clearly have the right to institute its suit either in the state court, or in an appropriate United States District Court.

Does the mere fact that Iowa statutes have provided for an "appeal" only to a state court deprive the national courts of jurisdiction? We believe not. The rule laid down by the Supreme Court of the United States and by the previous decisions of this court has long been that purely procedural state statutes may neither restrict, deny nor enlarge the jurisdiction of the Courts of the United States. It is one of the most fundamental and elementary rules of federal jurisprudence that the jurisdiction of the United States Courts and the right of a litigant to resort to such courts are governed solely by federal statutes.

The situation here presented is quite comparable with that in the recent case of **Burford et al. v. Sun Oil Co. et al.**, 319 U. S. 315, 87 L. Ed. 1424. It there appeared that the State of Texas had adopted by statute a rationing scheme, regulating the drilling of oil wells within its

borders. An administrative proceeding before the Texas Railroad Commission was prescribed and anyone aggrieved by a decision of the commission might appeal to the Texas courts. Then Gulf Co. filed a complaint in the U. S. District Court, by which it sought cancellation of a permit issued to Buford by the State Commission allowing him to haul sand, etc. The trial court dismissed the complaint on the ground that because of the public nature of the questions the parties should be relegated to the state courts in the first instance. The Court of Appeals for the Fifth Circuit reversed and the Supreme Court granted certiorari. Black, in speaking for the Supreme Court of the United States, Mr. Justice Black said:

> "Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Commission's contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a State court can be taken under relevant Texas statutes; but, of course, the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

A majority of the Supreme Court concluded that the case was properly within the jurisdiction of the Federal District Court, but that, as a matter of sound, equitable discretion and because of possible conflict with state authorities, the district court should have declined to exercise that jurisdiction.

It is well established, as said by the late Judge Walter Sanborn in Landon v. Public Utilities Commission, 234 Fed. 152, at page 164, that:

"Rights created or provided by the statutes of the states to be pursued in the state courts may be enforced and administered in the national courts, either at law, in equity, or in admiralty, as the nature of the rights or remedies may require."

The mere fact that the state legislature provided for the service of a "notice of appeal" rather than the filing of a suit in the district court, and the service of an ordinary summons, or original notice, cannot defeat the right of a non-resident to resort to an appropriate federal tribunal. It is true that the Rock Island, appellant in No. 14,724, did serve upon the sheriff and upon the landowner a notice of appeal wherein it was stated that the appeal was being taken to the United States District Court. The Rock Island likewise filed a complaint in the United States District Court, caused a summons to be issued under the federal rules and served upon the landowner, requiring him to answer the complaint within twenty days after such service.

The "notice of appeal" to the United States District Court was necessary under the Iowa statute to prevent the award of the sheriff's commission from becoming a finality, for the statute (Sec. 472.17, Iowa Code 1950) expressly says that an award made by the commissioners shall be final unless appealed from. The service of the notice of appeal was, under the Iowa statute, necessary to convert the then purely administrative proceeding into a suit of a civil nature. But the fact that such a notice was served does not deprive a non-resident condemnor of his right to bring a civil action as prescribed by 28 U. S. C. A., Sec. 1332.

The situation here presented is quite parallel with that which was before the United States District Court for Southern Iowa in the case of In re Mississippi River Power Co., 241 Fed. 194. That case involved the tax assessment

upon a dam in the Mississippi River. The local assessor assessed the property at $4,000,000 and imposed a 100% penalty for refusal of the property owner to make the proper return. When the assessment came before the Board of Review provided for by the Iowa statutes, the power company filed objections and the Board reduced the assessment to $600,000. The assessor, as authorized by statute, then appealed to the state court and the power company removed to the United States District Court. It was contended that the appeal was not a suit. District Judge Wade pointed out that the statute made the proceeding triable in equity and that any party aggrieved had a right of appeal to the Supreme Court of the state. The opinion concludes:

> "So there cannot be any serious question but that the proceedings upon appeal are judicial in character, and the only remaining question is whether or not such judicial proceedings constitute a suit for removal purposes."

We submit that the opinion of this court erroneously makes the right of a nonresident to resort to a federal court in a diversity case dependent upon the procedural steps prescribed by state statutes. This is contrary to every principle of federal jurisprudence. The long established rule is that the jurisdiction of United States Courts and the right of a litigant to resort to such a court cannot be restricted nor enlarged by state statutes.

Perhaps, unfortunately, appellant's opening brief in this cause was not prepared by the writer of this petition because of conditions of health. The rules of this court restrict a reply brief to fifteen pages. We successfully complied with that rule, but in doing so, we apparently failed to make our position plain. We believe that upon further consideration, this court should conclude that the opinion handed down on April 30, 1953, should be withdrawn and

the case resubmitted on the issue of the right of a non-resident condemnor to bring his suit for the determination of the compensation to which an Iowa landowner is entitled in the federal tribunal.

The Removal Question.

By the opinion of April 30, 1953, this court holds that the decisions of the Supreme Court of the United States in Mason City & Fort Dodge R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321, and **Shamrock Oil & Gas Corp. v. Sheets**, 313 U. S. 100, 85 L. Ed. 1214, 61 S. Ct. 868, a railroad company condemning land under the Iowa Code is the plaintiff, and the landowner is the defendant for purposes of removal. We desire to call to the attention of this court the fact that the Boynton case involved solely a certified question reading as follows:

> "Was the landowner a defendant within the meaning of the removal statute?"

The Supreme Court of the United States answered, "Yes." Justice Holmes there expressly pointed out that his opinion was not to be construed as overruling the Iowa case of **Myers v. C. N. W. R. Co.**, 118 Iowa 312, 91 N. W. 1076.

The Shamrock case was not a condemnation action. There plaintiff, a non-resident of the state, commenced his action for recovery of less than the jurisdictional amount of $3,000. The defendant filed a counterclaim for more than $3,000, and the plaintiff sought to remove the action to the federal court. The Supreme Court of the United States held that the mere filing of the counterclaim did not convert the plaintiff in the suit into a defendant within the meaning of the removal statute.

Here, as Justice Holmes pointed out in the opinion in the Boynton case, the terms, plaintiff and defendant, as

applied to condemnation proceedings, can be used only in an uncommon and liberal sense. The only issue presented by the pleadings is the amount to which the landowner is entitled. Upon the trial of the case the award made by the sheriff's commission may be increased or decreased. If increased, the condemnor must pay the additional amount, together with an attorney's fee. We do not believe that either of the cases relied upon in the opinion of this court constitute authorities supporting the court's conclusion.

We respectfully request that a rehearing be granted.

R. L. READ,
A. B. HOWLAND,
B. A. WEBSTER, JR.,
500 Bankers Trust Building,
Des Moines 9, Iowa,
Attorneys for Appellant, No. 14,724, Cross-Appellee, No. 14,725, Appellee, No. 14,726.

Certificate of Counsel.

The above and foregoing petition for rehearing has been personally prepared by the undersigned. The petition is filed in good faith, and I firmly believe it to be meritorious and worthy of the consideration of the court.

A. B. Howland,
500 Bankers Trust Building,
Des Moines 9, Iowa,
Attorney for Appellant, No. 14,724, Cross-Appellee, No. 14,725, Appellee, No. 14,726.

(Endorsed): Filed in U. S. Court of Appeals, May 13, 1953.

[fol. 105] (Opinions on Denial of Petition for Rehearing in Causes Nos. 14,724, 14,725 and 14,726.)

United States Court of Appeals
For The Eighth Circuit.

No. 14,724.

Chicago, Rock Island and Pacific Railroad Company,
Appellant,
vs.
Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa,
Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

No. 14,725.

Archie C. Stude,
Cross-Appellant,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Cross-Appellee.

Cross-Appeal from United States District Court for the Southern District of Iowa.

No. 14,726.

Archie C. Stude and William Lumpkin,
Appellants,
vs.
Chicago, Rock Island and Pacific Railroad Company,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[June 17, 1953.]

On Denial of Petition for Rehearing.

Before GARDNER, Chief Judge, and THOMAS and COLLET, Circuit Judges.

COLLET, Circuit Judge.

On petition for rehearing it is asserted that we should have treated the appeal from the award of the sheriff's commission to the United States District Court, and the subsequent filing of a complaint in the United States District Court, as an original proceeding in that court and should have held that the United States District Court had jurisdiction on grounds of diversity of citizenship, as was done in *Burford* v. *Sun Oil Co.*, 319 U.S. 315. In our judgment there is no justification for placing that interpretation on the record. The condemnor did not file its action in the United States District Court, as was done in the Burford case. It strictly followed the Iowa procedure for initiating a condemnation suit in the Iowa state courts. The complaint that was filed in the United States District Court after the appeal was lodged there was required by the Iowa statute, and a similar complaint was filed in the Iowa District Court after the appeal to that court. The complaint filed in the United States District Court cannot be treated as having created an original action in the federal court. It is correct, as the Rock Island contends, that the Iowa legislature could not restrict or enlarge the jurisdiction of the federal court by procedural statutes, and we must not be understood to have so held. It may well be that if this action had been commenced in the United States District Court, that court would have had jurisdiction. But actions are not initiated in the federal courts by filing with a sheriff a request that he appoint commissioners to assess damages. It might also be that if the action had been initiated in the federal court that that court would have followed the Iowa procedure under Rule 71A. But it

was not asked to do so. And we do not pass upon that question because it, like the question of whether the action could have been initiated in the federal court, is not in the case.

The petition for rehearing must be and is denied.

Judge Gardner is of the opinion that the petition should be granted.

GARDNER, Chief Judge, Dissenting.

I am not in accord with the views of the majority of the court as above expressed. The primary facts as distinguished from the interpretation of those facts are fairly recited in the original opinion (.... F.2d ....) and need not be here repeated.

In our original opinion, referring to the contention of the Rock Island that the District Court had original jurisdiction in the proceeding, we said:

"The question of whether the Rock Island could have initiated the proceedings in the United States District Court is not before us for the simple reason that it did not do so and hence the propriety of such action is not presented. We express no opinion on that subject."

This pronouncement is vigorously challenged by the petition for rehearing, and in the foregoing opinion by the majority of this court this position is reaffirmed in the following words:

"On petition for rehearing it is asserted that we should have treated the appeal from the award of the sheriff's commission to the United States District Court and the subsequent filing of a complaint in the United States District Court as an original proceeding in that court and should have held that the United States District Court had jurisdiction on grounds of diversity of citizenship, as was done in *Burford* v. *Sun Oil Co.*, 319 U.S. 315. In our judg-

ment there is no justification for placing that interpretation on the record. The condemnor did not file its action in the United States District Court, as was done in the Burford case."

It is clear that the question presented is as to the jurisdiction of the District Court. There was diversity of citizenship and the amount involved exceeded the jurisdictional requisite. The authority to determine the requisites to jurisdiction in the Federal courts in diversity of citizenship cases is vested in Congress. By Section 1332, Title 28 U.S.C., it is provided that "(a) the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States; * * *." If these prerequisites exist the court is without authority to deny access to the Federal court to any litigant having the qualifications fixed by Congress.

It is said in the majority opinion that the original jurisdiction of the District Court was not invoked by the Rock Island. It is true it had complied with the Iowa statute by proceedings before a Sheriff's Commission and those proceedings were not of a judicial character. The Iowa statute, however, provides that unless an appeal is taken within the specified period the award so made shall become final and an appeal to the State District Court was perfected in accordance with the Iowa statute. Notice of appeal to the United States District Court was served and I think that was a nullity. However, the jurisdiction of the trial court was not invoked by the service of this notice of appeal but it appears from the record and stands without dispute that "On March 7, 1952, the Chicago, Rock Island and Pacific Railroad Company filed in the office of the Clerk of the United States District Court for the Southern District of Iowa, Southern Division, the following Complaint." The complaint alleges diversity of citizenship; it alleges that

the amount or value involved exceeds $3,000, exclusive of interest and costs; it alleges facts showing that the Rock Island was authorized by proper certificate from the Interstate Commerce Commission to construct a new line of railroad; that it had been authorized to institute condemnation proceedings for the lands described in the complaint; that pursuant to provisions of the Iowa statute it had instituted proceedings in eminent domain before the sheriff of Pottawattamie County, Iowa; that an award had been made which it is alleged was excessive. The complaint ends with the prayer,

"Wherefore, plaintiff prays that upon the trial of this cause the damages sustained by the lands of Archie C. Stude, by reason of the appropriation of the lands hereinbefore described, be fixed at not to exceed $10,000, and that plaintiff have such further relief as may be just and proper under the circumstances."

Not only was this complaint filed but the record recites that "Summons was issued by the Clerk of the United States District Court for the Southern District of Iowa on March 7, 1952, addressed to Archie C. Stude, William Lumpkin and Pottawattamie County, in the usual form, citing the defendants named 'to answer the Complaint, copy of which is herewith served upon you, within twenty days after service of this summons upon you.' " The record also shows that the summons was served by the United States Marshal on all defendants.

The Federal Rules of Civil Procedure, promulgated by the Supreme Court pursuant to congressional authorization and hence having the effect of law, provide the manner in which the jurisdiction of the District Court shall be invoked.

Rule 3 provides:

"A civil action is commenced by filing a complaint with the court."

Rule 4(a) provides:

"Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants."

After the proceedings before the Sheriff's Commission had been had this proceeding became a civil action. *Lewis Eminent Domain*, Vol. 2, 3rd Ed., Sec. 513; *Metropolitan R. Co.* v. *District of Columbia*, 195 U.S. 322; *Chappell* v. *United States*, 160 U.S. 499; *Kohl* v. *United States*, 91 U.S. 367. Plaintiff, having exhausted its administrative remedies provided by the Iowa statute, had at the time of filing its complaint a civil action, and the allegations of the complaint plainly show that it was invoking the jurisdiction of the Federal court on the ground that a diversity of citizenship existed and the requisite amount to confer jurisdiction was involved. In other words, these allegations of the complaint were the basis of its right of access to the Federal court—not that it was in Federal Court because it had appealed from the Commissioners' award. The mere fact that the attempted appeal from the commissioners' award was not warranted and did not in itself confer jurisdiction, did not preclude the Rock Island from invoking the original jurisdiction of the Federal Court on the grounds set out in its original complaint. All the essentials to jurisdiction designated by Act of Congress being present, it seems illogical to hold that the court has been deprived of that jurisdiction and that plaintiff has been deprived of the right of access to the Federal Court which by legislative act it is entitled to.

A somewhat similar situation was presented to the Supreme Court in *Burford* v. *Sun Oil Co.*, *supra*. In passing it may be noted that this case was not cited in appellant's

original brief and was not otherwise called to our attention until petition for rehearing. In the course of the opinion in that case it is among other things said:

"Jurisdiction of the federal court was invoked because of the diversity of citizenship of the parties, and because of the Companies' contention that the order denied them due process of law. There is some argument that the action is an 'appeal' from the State Commission to the federal court, since an appeal to a state court can be taken under relevant Texas statutes; but of course the Texas legislature may not make a federal district court, a court of original jurisdiction, into an appellate tribunal or otherwise expand its jurisdiction, and the Circuit Court of Appeals in its decision correctly viewed this as a simple proceeding in equity to enjoin the enforcement of the Commission's order."

In that case, as in the instant case, proceedings had been had before a commission and there was an attempted appeal to the Federal Court but the plaintiff had, as in the case at bar, filed an original complaint and jurisdiction was invoked by the filing of that complaint. I think there is no warrant for the assertion that in this case the plaintiff did not institute an original proceeding in the Federal Court by the filing of its complaint. All the prerequisites to that jurisdiction were present. Not only were all the necessary prerequisites of jurisdiction present but the jurisdiction has been invoked in literal compliance with the Federal Rules of Civil Procedure. In these circumstances I am of the view that the Chicago, Rock Island and Pacific Railroad Company can not lawfully be denied access to the Federal Court.

I would grant the petition for rehearing.

[fol. 113] (Order denying petition of Chicago, Rock Island and Pacific Railroad Company for Rehearing, in Causes Nos. 14,724, 14,725 and 14,726.)

September Term, 1952.

Wednesday, June 17, 1953.

Petition for rehearing on behalf of Chicago, Rock Island and Pacific Railroad Company and brief in support has been considered by the Court, and It is now here Ordered that said Petition be, and is hereby, denied in accordance with opinion of the majority of this Court this day filed herein.

June 17, 1953.

[fol. 114] (Order Staying Issuance of Mandate in Causes Nos. 14,724, 14,725 and 14,726.)

September Term, 1952.

Monday, July 6, 1953.

On Consideration of the motion of the Chicago, Rock Island and Pacific Railroad Company for a stay of the issuance of the mandate of this Court in these causes until August 1, 1953, and the resistance of Archie C. Stude and William Lumpkin thereto, pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here Ordered by this Court that the issuance of the mandate in these causes be, and the same is hereby, stayed until August 1, 1953, and if within this stay there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of said petition by the Supreme Court.

July 6, 1953.

[fol. 115] (Praecipe of Matters to be included in Record for Supreme Court, U. S., in Causes Nos. 14,724, 14,725 and 14,726.)

To Mr. E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit:

In preparing the record in the foregoing cases to be lodged with the Clerk of the Supreme Court of the United States together with a petition for writ of certiorari, please include the following designated portions of the points or propositions of law relied upon, with citations of authorities, from the briefs of the parties, to-wit:

1. From the brief of appellant in case No. 14,724, Propositions of Law Relied Upon and Citations, points I to III, inclusive, appearing on pages 8 and 9 thereof.

2. From the brief of appellees in case No. 14,724, points to be Argued with Citations, comprising points I to IV, inclusive, appearing on pages 7 to 11, inclusive of said brief, and also from the brief of Cross-appellant in No. 14,725, and brief of appellants in No. 14,726, points I and II, appearing on pages 57 and 58 and 59 of said brief.

3. From the Reply brief of appellant in No. 14,724, points to be Argued in Reply, I, II and III, appearing on pages 1 and 2 of said brief, and from the brief of appellee in No. 14,725 and No. 14,726, point to be Argued I, appearing on page 18 thereof.

R. L. READ,

A. B. HOWLAND,

and

B. A. WEBSTER, JR.,
Attorneys for Chicago, Rock Island and Pacific Railroad Company.

[fol. 116] (Endorsed): Filed in U. S. Court of Appeals, Jul. 2, 1953.

[fol. 117] (Clerk's Certificate.)

United States Court of Appeals
for the Eighth Circuit.

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains printed consolidated record on which the appeals were heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes wherein Chicago, Rock Island and Pacific Railroad Company was Appellant and Archie C. Stude, William Lumpkin and Pottawattamie County, Iowa, were Appellees, No. 14,724, Archie C. Stude was Cross-Appellant and Chicago, Rock Island and Pacific Railroad Company was Cross-Appellee, No. 14,725, and Archie C. Stude and William Lumpkin was Appellant and Chicago, Rock Island and Pacific Railroad Company was Appellee, No. 14,726.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 7th day of July, A. D. 1953.

E. E. KOCH,
Clerk of the United States Court of Appeals for the Eighth Circuit.

(Seal)

[fol. 118] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 209

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Petitioner,

vs.

ARCHIE C. STUDE, WILLIAM LUMPKIN and POTTAWATTAMIE COUNTY, IOWA

ORDER ALLOWING CERTIORARI—Filed October 12, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.